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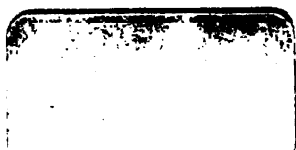
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM JANUARY 31, 1905, TO JULY 3, 1905.

OFFICIAL REPORT.

VOLUME 32.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1905.

Copyright, 1905,
BY
BANCROFT-WHITNEY COMPANY.

Rec. Jan. 17, 1906

SAN FRANCISCO:
THE FILMER BROTHERS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the justices, by Mr. A. C. Schneider, a member of the bar of the supreme court.

(iii)

JUSTICES
OF
The Supreme Court of the State of Montana,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

***COMMISSIONERS:**

HON. JOHN B. CLAYBERG,
HON. HENRY N. BLAKE,
HON. W. H. POORMAN.

OFFICERS OF THE COURT ON MAY 1, 1905.

ALBERT J. GALEN, Attorney General.
† W. H. POORMAN, First Asst. Attorney General.
EDGAR M. HALL, Second Asst. Attorney General.
JOHN T. ATHEY, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

***The Ninth Legislative Assembly having failed to make any appropriation for salaries and office expenses of the supreme court commission, the commissioners filed their resignations on March 31, 1905, which were accepted by the Court on the same date, with due acknowledgment of the aid furnished to it by the members of the commission, in the disposition of cases during their terms of office.**

† Appointed May 1, 1905, vice Frank W. Mettler, resigned.

ATTORNEYS AND COUNSELORS AT LAW

Admitted from July 6, 1905, to July 29, 1905.

CAMPBELL, WILLIAM D.

GOODMAN, LOUIS J.

MILLER, SIMON P.

PHELAN, EDWARD D.

POORE, J. A.

(v)



DIRECTORY

OF THE

Judicial Districts of the State of Montana.

1905.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clarke. County Seat, Helena.

District Judges: Hon. Henry C. Smith; Hon. James M. Clements.

Officers: County Attorney, Leon A. La Croix, Esq.; Clerk of District Court, Sidney Miller; Sheriff, Peter Scharrenbroich.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. John B. McClernan; Hon. George M. Bourquin; Hon. Michael Donlan.

Officers: County Attorney, J. E. Healy, Esq.; Clerk of District Court, W. E. Davies; Sheriff, J. J. Quinn.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

District Judge, Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda)—
County Attorney, John H. Tolan, Esq.; Clerk of District Court, Ira C. Gnose; Sheriff, T. J. Fleming.

Officers of Powell County (County Seat, Deer Lodge)—
County Attorney, O'B. O'Bannon, Esq.; Clerk of District Court, R. Lee Kelly; Sheriff, Jas. C. Barnden.

Officers of Granite County (County Seat, Philipsburg)—
County Attorney, George A. Maywood, Esq.; Clerk of District Court, George O. Burke; Sheriff, Finley McDonald.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.*

District Judge, Hon. F. C. Webster.

Officers of Missoula County (County Seat, Missoula)—County Attorney, W. L. Murphy, Esq.; Clerk of District Court, R. W. Kemp; Sheriff, Davis Graham.

Officers of Ravalli County (County Seat, Hamilton)—County Attorney, C. B. Calkins, Esq.; Clerk of District Court, A. C. Bahn; Sheriff, Wm. F. Cook.

Officers of Sanders County (County Seat, Thompson Falls)—County Attorney, H. C. Schultz, Esq.; Clerk of District Court, L. E. Smith; Sheriff, C. E. Baker.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judge, Hon. Llewellyn L. Callaway.

Officers of Beaverhead County (County Seat, Dillon)—County Attorney, Henry R. Melton, Esq.; Clerk of District Court, F. A. Hazelbaker; Sheriff, M. L. Gist.

Officers of Jefferson County (County Seat, Boulder)—County Attorney, C. R. Stranahan, Esq.; Clerk of District Court, George Pfaff; Sheriff, A. F. Gibson.

Officers of Madison County (County Seat, Virginia City)—County Attorney, S. V. Stewart, Esq.; Clerk of District Court, J. G. Walker; Sheriff, Charles Kadell.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Carbon and Sweet Grass.

District Judge, Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, A. P. Stark, Esq.; Clerk of District Court, Arthur Davis; Sheriff, A. S. Robinson.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, Sydney Fox, Esq.; Clerk of District Court, E. E. Esselstyn; Sheriff, M. W. Potter.

*County of Sanders created by Act of the Ninth Legislative Assembly (1905) and added to Fourth Judicial District. The Act will take effect on March 1, 1906.

Officers of Sweet Grass County (County Seat, Big Timber)—County Attorney, J. E. Barbour, Esq.; Clerk of District Court, H. C. Pound; Sheriff, O. A. Falling.

SEVENTH JUDICIAL DISTRICT.

Counties of Yellowstone, Custer, Dawson and Rosebud.

District Judge, Hon. Chas. H. Loud.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, H. L. Wilson, Esq., Clerk of District Court, F. H. Foster; Sheriff, W. P. Adams.

Officers of Custer County (County Seat, Miles City)—County Attorney, T. J. Porter, Esq.; Clerk of District Court, A. T. McAusland; Sheriff, W. E. Savage.

Officers of Dawson County (County Seat, Glendive)—County Attorney, C. C. Hurley, Esq.; Clerk of District Court, Harry Sample; Sheriff, G. W. Wolloams.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, J. C. Lyndes, Esq.; Clerk of District Court, D. J. Muri; Sheriff, J. Z. Northway.

EIGHTH JUDICIAL DISTRICT.

County of Cascade. County Seat, Great Falls.

District Judge, Hon. Jere B. Leslie.

Officers: County Attorney, H. S. Green, Esq.; Clerk of District Court, Chas. P. Proctor; Sheriff, Edward Hogan.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.*

District Judge, Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, A. J. Walrath, Esq.; Clerk of District Court, C. B. Anderson; Sheriff, E. M. Reynolds.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, J. W. Munden.

*By Act of the Ninth Legislative Assembly (1905) Meagher County was detached from the Ninth and added to the Tenth Judicial District.

JUDICIAL DISTRICTS.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.*

District Judge, Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—
County Attorney, R. E. Ayers, Esq.; Clerk of District Court,
J. B. Ritch; Sheriff, L. P. Slater.

Officers of Meagher County (County Seat, White Sulphur
Springs)—County Attorney, N. B. Smith, Esq.; Clerk of Dis-
trict Court, A. C. Grande; Sheriff, C. H. Sherman.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Teton.

District Judge, Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—
County Attorney, W. T. McKeown, Esq.; Clerk of District
Court, J. K. Lang; Sheriff, O. P. Gregg.

Officers of Teton County (County Seat, Chouteau)—
County Attorney, P. I. Cole, Esq.; Clerk of District Court,
S. McDonald; Sheriff, K. McKenzie.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—
County Attorney, Chas. N. Pray, Esq.; Clerk of District Court,
C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—
County Attorney, J. J. Kerr, Esq.; Clerk of District Court,
C. C. Beede; Sheriff, W. S. Griffith.

*Meagher County added to Tenth Judicial District by Act of Ninth
Legislative Assembly (1905).

ERRATA.

Page 25, paragraph 1 of the syllabus, line 1, read "Civil Code," instead of "Code of Civil Procedure."

Page 443, paragraph 12 of the syllabus, line 4, read "which it tends to," instead of "which it intends to."

Page 529, line 4 from bottom of page, omit "(Tex. Civ. App.)"

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FOR
RULES
OF THE
SUPREME COURT
OF THE
STATE OF MONTANA,

PROMULGATED FEB. 1, 1905,

See Volume 30 Montana, page xxix.

(xxvii)

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1904.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, }
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

COMMISSIONERS:

HON. JOHN B. CLAYBERG,
HON. HENRY N. BLAKE,
HON. W. H. POORMAN.

STATE EX REL. HEMPSTEAD ET AL., RELATORS, v. DIS-
TRICT COURT OF THE THIRD JUDICIAL DIS-
TRICT ET AL., RESPONDENTS.

(No. 2,016.)

(Submitted December 21, 1903. Decided January 31, 1905.)

*Writ of Supervisory Control—Contempt—Decree—Pleading—
Demurrer.*

1. A petition for an order to show cause why S. should not be punished for contempt of court in violating a decree, and affidavits in
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its support having been filed in the district court, they were demurred to upon the ground that they did not state facts sufficient to constitute contempt. The demurrer was sustained. Relators applied for writ of supervisory control. *Held*, that the question whether the decree alleged to have been violated was sustained by the pleadings and the evidence, could not be considered by the district court on the demurrer, it having had jurisdiction of the parties and the subject matter, and the writ ordered issued directing the district court to set aside and vacate the order sustaining the demurrer and fix a date for the hearing of the petition.

APPLICATION by the state, on the relation of John Hempstead and others, against the district court of the third judicial district, and Honorable Welling Napton, judge thereof, for writ of supervisory control. Writ issued.

Mr. Ed. Scharnikow, for Relators.

Messrs. Napton & Napton, for Respondents.

HON. J. M. CLEMENTS, judge of the first judicial district of Montana, sitting in the place of the chief justice, delivered the opinion of the court.

Application for writ of supervisory control. On March 17, 1903, John Hempstead, on behalf of himself and others, filed his motion in the district court of Deer Lodge county, praying that Gregor Schwend be cited to appear and show cause why he should not be held for contempt of court, and in support of such motion filed his affidavit and that of one Alex. Lee, charging Gregor Schwend with violating the terms of a decree of that court theretofore made and entered, defining the rights to and distributing the waters of Race Track creek, situated in Deer Lodge county, setting forth, in substance, that Gregor Schwend, being one of the parties to the action in which such decree was entered, had, in violation of the terms of such decree, and in disregard of the directions given him by the commissioner appointed by order of the district court to distribute the waters of Race Track creek to the various parties entitled thereto, diverted the waters of such creek to his own use in excess of that to which he was entitled.

On March 19, 1903, in response to the order to show cause, Gregor Schwend demurred to the affidavits and petition upon the ground that they did not state facts sufficient to constitute contempt. Thereafter, on September 14, 1903, the district court sustained the demurrer, and refused to hear the petition of relators.

On December 9, 1903, relators filed their petition in this court, praying this court to issue its order of supervisory control directed to the district court, and requiring it to set aside and vacate the order sustaining the demurrer to the petition of relators, and directing the district court to at once fix a time for the hearing of such petition, on the ground that the order of the district court sustaining the demurrer and refusing to hear the petition of relators was an abuse of jurisdiction, and in violation of the plain legal rights of the relators.

The affidavit of John Hempstead sets forth the decree distributing the waters of Race Track creek and the amounts allotted to each of the parties entitled thereto in the order of their respective priorities, showing the right of Gregor Schwend to be the twenty-second in the order of priority; also the appointment and qualification of Alex. Lee as commissioner; and that on the 25th day of August, 1902, there was not sufficient water in Race Track creek, at the point where the ditch of Gregor Schwend is taken from the creek, to supply the parties owning rights prior to that of Schwend; that on August 27, 1903, Schwend raised the headgate of his ditch, and diverted one hundred and eighty inches of water to his own use upon his land, after having been notified by the commissioner that the parties owning prior rights desired the use of the water; that he continued so to use the water during the month of September following, in disregard of the order set forth in the decree and the direction given him by the commissioner. The affidavit of Alex. Lee sets forth substantially the same state of facts as that shown by the affidavit of Hempstead.

Respondents move that the writ be refused by this court, and contend that in the original proceedings the district court did not have jurisdiction to decree the relative rights of the

parties to the action as between each other, because at the trial the parties stipulated that each should be deemed to have denied the allegations of every other party to the action. A demurrer admits that all material matters properly alleged are true, and, as the court in this case had jurisdiction of the parties and the subject matter, and the violation of the provisions of this decree is the basis of the charge of contempt, the question of whether the decree is sustained by the pleadings and the evidence cannot be inquired into on demurrer.

Respondents urge that the Act of the legislature providing for the appointment of water commissioners is not constitutional in so far as it interferes with the rights of such of the parties to this suit as were tenants in common when the decree was entered. No authority is cited which supports this contention, and no reason is apparent why the Act contravenes any provisions of the state Constitution.

The affidavits aver facts sufficient to sustain an order holding for contempt, and it is ordered that the writ issue as prayed for.

Writ issued.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being disqualified, takes no part in the foregoing decision.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing opinion.

STATE EX REL. BREEN, RELATOR, v. TOOLE, GOVERNOR,
RESPONDENT.

(No. 2,131.)

(Submitted January 7, 1905. Decided February 2, 1905.)

Mandamus—Certificate of Election—Issuance—Affidavit—Insufficiency—Presumptions—Judicial Notice.

Mandamus—Governor—Certificate of Election—Affidavit—Insufficiency.

1. An affidavit on application for writ of *mandamus* to the governor

to issue a certificate of election to relator as one of the judges of a certain district held insufficient, where it merely alleged that the law provides for three judges in such district, that at the election there were six candidates, and that the relator, as one of the candidates, received the third highest number of votes, the court taking judicial notice of the fact that the governor's proclamation called for the election of two judges only in such district, and that three political party organizations had tickets in the field seeking the suffrages of the people for their respective candidates. Under such circumstances the presumption will not be indulged that the electors voted for more than two candidates for judgeships.

Mandamus—What Relator must Show.

2. To warrant the issuance of *mandamus*, relator must show, among other things, a clear legal right in himself to have a particular act or duty performed by the defendant.

Mandamus—When Writ may be Invoked.

3. The right sought to be protected by *mandamus* must be a substantial one, and the writ may not be invoked to determine questions in which relator has no personal or pecuniary interest, or where its issuance will be futile.

Mandamus—Affidavit—Contents—Inference—Speculation.

4. The affidavit on which an application for *mandamus* is based must set forth clearly and succinctly the facts furnishing the foundation for the relief sought, leaving nothing to inference or speculation.

Supreme Court—Judicial Notice—Proclamation of Governor—Political History of State.

5. Under Code of Civil Procedure, section 3150, the court will take judicial notice of the contents of the proclamation of the governor calling an election, and of the political history of the state.

Elections—Canvassing Officers—Powers.

6. *Obiter*: The powers of canvassing officers are neither judicial nor quasi judicial, their sole duty being to ascertain and declare the result of the election.

Mandamus—Elections—Canvassing Officers—Evidence.

7. *Obiter*: Courts in *mandamus* proceedings to compel the performance of the ministerial duties of canvassing officers cannot hear evidence touching the regularity or legality of any election and decide controversies touching these matters.

General Elections—Validity—Notice.

8. *Obiter*: To render a general election valid, the formalities of notice, etc., are not necessary.

Special Elections—Vacancies—Notice.

9. *Obiter*: It is only when special elections are held to fill vacancies that the technicality of notice is essential.

Mandamus proceedings on the relation of Peter Breen against Joseph K. Toole, Governor. Dismissed.

Mr. T. J. Walsh, Mr. J. E. Healy, Mr. J. B. Roote and Mr. J. E. Davies, for Relator.

Mr. William Wallace, Jr., Mr. H. G. McIntire, Mr. C. B. Nolan, Mr. James Donovan and Mr. Alex. Mackel, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *mandamus*. The affidavit on which the application is based states substantially the following: That under section 32 of the Code of Civil Procedure, as amended by an Act of the legislative assembly approved March 11, 1901 (Laws 1901, p. 156), it is provided that there must be a district judge in each judicial district of the state, who must be elected by the qualified voters of the district; that his term of office shall be four years; and that it is further provided that in the first district there must be two judges, and in the second district three. It is then averred that on May 4, 1901, the governor of the state of Montana appointed John B. McClerman an additional judge for the second district, to make up the number provided by statute; that at the general election held in November, 1902, the said John B. McClerman was duly elected by the electors of Silver Bow county, constituting said judicial district, as his own successor, and that by virtue of his appointment and subsequent election he has continued to discharge the functions of one of the judges for that district; that at the general election held in the state of Montana on the 8th day of November, 1904, there were six candidates for the office of judge in that district voted for by the voters, namely, George M. Bourquin, Michael Donlan, Peter Breen, the relator, Lewis P. Forestell, G. J. Langford and Charles Kohl; that the returns of said election so held in the county of Silver Bow had been duly made by the judges and clerks of election of the various voting precincts in said county to the board of county canvassers, and that the same were duly canvassed by that board; that it was therefrom determined that George M. Bourquin had received for the office of judge of the second judicial district 6,753 votes; Michael Donlan, 6,502 votes; Peter Breen,

5,594 votes; Lewis P. Forrestell, 5,498 votes; G. J. Langford, 1,097 votes, and Charles Kohl 928 votes, no other person receiving any votes for such office; that thereupon the clerk of the board of county canvassers, having entered upon the records of said board a statement of the results of election as ascertained by the board, made a certified copy of so much thereof as related to the votes given for persons voted for for state and judicial officers, and duly transmitted the same to the Secretary of the State of Montana; that this statement shows that the persons last above mentioned each received for the office of judge of the second judicial district the number of votes which it is averred the board of county commissioners determined from the returns he had received; that thereafter, and on the 5th day of December, 1904, the board of canvassers of the state of Montana met to compute and determine, from the statement of the votes from counties for state and judicial officers, the votes received by the various candidates for said offices; that thereafter, at an adjourned session of the board held on the 7th of December, 1904, it determined from the returns so transmitted from the county of Silver Bow that the six candidates above mentioned for the judgeship in Silver Bow county had received respectively the number of votes declared by the county board of canvassers; that thereupon the Secretary of the State of Montana made out and filed in his office a statement of such determination of the votes cast for the various state and judicial officers as they appeared from the returns transmitted from the clerks of the various counties, including the vote for the office of judges of the second judicial district, and transmitted a copy of the same to the governor of the state of Montana; that thereupon the relator demanded of the governor, the defendant herein, that he, as such governor, issue to the relator a commission as judge of the second judicial district, but that the defendant refused, and still refuses, to issue such commission, or any commission at all; that the relator is by birth a citizen of the United States, forty-four years of age, residing in the county of Silver Bow; and that prior to the 1st day of January, 1900, he was admitted to practice law in all the courts of the state of

Montana. There are stated reasons why this court should assume original jurisdiction of the controversy and grant relief.

At the hearing the defendant, by motion to quash the alternative writ, challenged the sufficiency of the facts to warrant the relief demanded. The motion was overruled *pro forma*, and an answer required. Thereupon evidence was heard and the cause submitted.

Are these facts sufficient to warrant the issuance of the writ? When the governor issued his proclamation giving notice of the general election to be held on November 8, 1904, under the requirements of sections 1160 and 1161 of the Political Code, he omitted therefrom all mention of an election of a third judge for the second judicial district, calling for the election of only two; this omission being made upon the assumption, no doubt, that the term for which John B. McClernan had been elected in 1902 was four years, and that there should be no election for the third judgeship in that district at the general election of last year. Of this action of the executive department of the state government, as well as the political history of the state, this court must take judicial notice. (Code of Civil Proc., sec. 3150.) The facts stated in the affidavit must be considered in the light of this knowledge, and their sufficiency determined accordingly. The conclusion thus reached will determine whether the relator is entitled *prima facie* to the relief demanded.

It is argued by counsel for relator that under the sections of the Constitution and the statute creating the office of district judge, fixing the term thereof, and providing for the filling of any vacancy therein (Const., Art. VIII, secs. 12, 13, 14, 18, 26, 34; Code of Civil Proc., sec. 35), John B. McClernan was elected in 1902 to serve the remainder of an unexpired term created by the amendment to section 32 of the Code of Civil Procedure, his appointment by the governor in May, 1901, having been to fill a vacancy until the next general election thereafter, and that his successor should have been elected in November, 1904. This contention is based upon a construction given the sections of the Constitution, *supra*, to the effect that the terms of district judges, both of those first provided for in section 12, as well as those subsequently provided for under sec-

tion 14, are intended to be uniform; in other words, no matter when a new judgeship is created, its term expires on the same date on which all other current terms expire. Assuming this to be so, it must follow, it is said, that since it appears that six candidates for judgeships were voted for in the second district, the three of them appearing to have received the highest number of votes were elected to the three offices provided for by the statute, although the proclamation of the governor called for the election of only two. This position also involves the assumption that the people disregarded the proclamation, and actually voted for candidates for the three offices, of whom the relator was one. This must be so, counsel say, or it must follow that the governor may go behind the returns in any case, and determine for himself whether a particular candidate has been elected, before he will issue his certificate—a thing which he may not be permitted to do under any circumstances.

On the part of the defendant the contention is that there is not alleged any fact to show that there was a candidate for the third office, or that the voters actually voted for one, and that, such being the case, there is no presumption that they did so. The contention is also made that under the provisions of the Constitution cited John B. McClernan was in 1902 elected for a term of four years, and that therefore his successor was not to be elected at the election last year.

Under the view we take of this case, we do not think it necessary to determine whether the Constitution requires uniformity in the terms of office of district judges, and hence whether a third judge should have been elected in Silver Bow county. For present purposes this may be conceded, and still we are of the opinion that the relator is not entitled to any relief.

We agree with counsel for relator that under the law in this state the powers of canvassing officers are neither judicial nor quasi judicial; that they have no means given to them to inquire, nor any power to inquire, beyond the returns of the local election boards; and that their sole duty is to ascertain and declare the result. They cannot hear evidence touching the regularity or legality of any election, and decide controversies

touching these matters. Nor may the courts, in *mandamus* proceedings to compel the performance of the ministerial duties of these officers, make such inquiry. (*State ex rel. Leech v. Board of Canvassers of Choteau County*, 13 Mont. 23, 31 Pac. 879; *Pigott v. Board of County Canvassers of Cascade County*, 12 Mont. 537, 31 Pac. 536; *Chumasero v. Potts*, 2 Mont. 242.) The only question to be determined is: Have they performed their duty, and, if not, does the relator, from his own statement, clearly show that he is entitled to have them perform it?

It will be noticed that it is not specifically alleged in the affidavit that candidates were actually voted for for all the three offices which might be filled by the people. At most, a knowledge of this fact must be gained, if at all, by inference from the averment that six candidates were actually voted for. From this statement it is sought to have the further legal inference drawn that the relator is entitled to one of the three offices, because the law declares that the candidate having the highest number of legal votes must be declared elected. (Const., Art. IX, sec. 13.)

Two prerequisites must exist to warrant the issuance of *mandamus*, to wit: First, the relator must show a clear, legal right in himself to have a particular act or a duty performed by the defendant; and, second, it must appear that the law affords no other adequate remedy. (High on Extraordinary Legal Remedies, secs. 9, 10; *State ex rel. Beach v. District Court*, 29 Mont. 268, 74 Pac. 498, and cases cited.) The right sought to be protected must be a substantial one. The writ may not be invoked to determine questions in which the relator has no personal or pecuniary interest, nor when its issuance will be futile. (High on Extraordinary Legal Remedies, sec. 10.) It follows from these principles that the affidavit should set forth clearly and succinctly the facts furnishing the foundation for the relief sought, leaving nothing to inference or speculation; for the alternative writ must, either by actual recital or by appropriate reference to the affidavit, set forth the facts so distinctly that the defendant may admit or deny them, so

that an issue may be formed for trial. (High on Extraordinary Legal Remedies, sec. 450.)

Tested by these rules, do the averments of the affidavit show that, notwithstanding the proclamation of the governor, the people of Silver Bow county elected, or undertook to elect, the relator to one of the three judgeships? Must we indulge the presumption, without specific averment to support it, that the people exercised their supposed constitutional privilege of voting for candidates for the third judgeship, or that they pursued the course pointed out by the governor, and voted for two only? What, if anything, is shown by the returns certified by the state canvassing board beyond the fact that there were six candidates, who each received the number of votes accredited to him, does not appear except by mere inference; and even the proper inference to be drawn is left in doubt and uncertainty. For the fact that six candidates were voted for, and that three of them received the highest number of votes, is just as consistent with the idea that the voters sought to fill only two of the judgeships as it is with the idea that they voted to fill the whole number; for we may not shut our eyes to another fact, which is a part of the political history of the state, that there were during the last political campaign at least three political party organizations in this state with tickets in the field, seeking the suffrages of the people for their respective candidates. If each of these parties nominated candidates for two of the judgeships only in Silver Bow county, the result would be six candidates, and the returns would be relatively the same as appear in this case; for almost certainly three of them would have received relatively more votes than any one of the other three. In that case no one of them would be entitled to claim that he was elected to the third judgeship, for no one voted with the intention of choosing one of them for that office.

We must, in order to issue the writ, indulge the presumption that the people acted independently of the governor's proclamation, and elected, or at least undertook to elect, the relator. This course might lead to absurd, not to say serious, results. Suppose each of the political parties nominated a

candidate for each of two of the judgeships, the terms of which were understood to expire at the end of 1904, and that no candidate was nominated by any of them for the third one. Suppose, again, that the people did not vote at all for any candidate for this place (and it does not appear that they did), then the issuance of the writ would be a declaration that the relator is *prima facie* entitled to the third judgeship, and the result would be an assumption on the part of this court to act for the people of the second district and elect for them a district judge. The situation presented is anomalous, and not free from difficulty; but no reason has been suggested why the relator's case should be so far aided by presumption as to entitle him to be declared *prima facie* in position to demand a certificate of election from the governor.

We do not controvert the rule recognized by all the courts that the formalities of notice, etc., are not necessary to render a general election valid. The law gives notice to the people when general elections are to take place. The officers whose duty it is to give the notice directed by the statute may not, by the neglect to perform this duty, deprive the people of their constitutional or statutory right to elect their officers. It is only when special elections are held to fill vacancies that the technicality of notice is essential. The law does not give notice of the time when such elections shall occur.

Nor have we overlooked another rule, stated by Mr. High (Extraordinary Legal Remedies, sec. 11), that *mandamus* proceedings do not always necessarily determine the question of the ultimate right involved, and that the writ is frequently granted when it can only determine one step in the progress of inquiry—as where, in election cases, it is issued to the board of canvassers of election to compel them to canvass the votes cast and declare the result, though it would still be necessary to resort to *quo warranto*, or some other appropriate proceeding, to determine the ultimate question of right, and admit the relator into the office sought.

As stated above, the circumstances of this case are peculiar and anomalous, and, so far as we have been able to ascertain,

have never arisen in any of those jurisdictions which have adopted the rule that in *mandamus* proceedings the validity or regularity of an election will not be inquired into. We are satisfied, however, that upon the facts as presented in this case the relator is not entitled to relief.

It follows that the motion to quash the writ must be sustained, and the application dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. STRANAHAN, RELATOR, v. BOARD OF
STATE CANVASSERS ET AL., RESPONDENTS.

(No. 2,130.)

(Submitted January 7, 1905. Decided February 2, 1905.)

Mandamus—Abatement—Expiration of Official Term—Judicial Notice.

Elections—Board of Canvassers—Mandamus—Abatement.

1. *Mandamus* proceedings, instituted against the state treasurer and the attorney general, as a majority of the state board of canvassers, to compel them to reconvene and certify certain votes cast for the relator for the office of district judge, dismissed as abated, where prior to the hearing the terms of such officers had expired, so that they could not perform the mandate of the writ if issued, where their successors had not been given notice of the proceedings and where no demand had been made upon them to perform the duties the performance of which was sought by the writ.

Supreme Court—Judicial Notice—State Officers—Mandamus—Terms of Office.

2. The supreme court will take judicial notice of the fact that on a certain date the persons sought to be coerced into action by *mandamus* were no longer state treasurer and attorney general, respectively, and that their successors had been elected, qualified and inducted into office.

Mandamus—Dismissed as Abated—When.

3. Where a *mandamus* proceeding has abated because of the expiration of the terms of office of the officials against whom it is directed, it will be dismissed, although the question of abatement has not been raised by counsel on either side.

ORIGINAL petition by F. E. Stranahan for writ of *mandamus* against the board of state canvassers and A. H. Barret and James Donovan, acting members. Dismissed.

Mr. F. E. Stranahan, pro se, Mr. T. J. Walsh, Mr. J. E. Healy, Mr. J. B. Roote, and Mr. J. E. Davies, for Relator.

Mr. C. B. Nolan, Mr. H. G. McIntire, Mr. William Wallace, Jr., Mr. James Donovan, and Mr. Alex. Mackel, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

This matter is before us upon the petition of the relator for a writ of mandate to compel the state board of canvassers to reconvene for the purpose of computing and certifying to the governor a number of votes alleged to have been cast for him at the last general election for the office of district judge of the twelfth judicial district. In the affidavit it is stated that A. H. Barret, then the state treasurer, and James Donovan, then the attorney general, constituting a majority of the state board of canvassers—the other member of the board having been absent at the time the board canvassed the returns of the votes cast at the general election for the different state and judicial offices—refused to count and certify the said votes. The relator prays that this court order the canvassing board to reconvene, and to certify the votes so cast for him to the governor.

The petition in this case was filed on the 8th day of last December. The alternative writ issued was returnable on the 10th. A demurrer to the petition was argued and submitted on the last-named date. The demurrer and a motion to dismiss, after due consideration, were overruled on the 23d, at which time the respondent was given five days to answer, the answer being filed on the 28th. On the 3d day of January, 1905, the case was set for hearing on the 6th of that month, and was argued and submitted on the 7th. Upon submission the respondent was given five days, and the relator three days thereafter, in which to file briefs. The relator's brief was filed

on the 14th, and the matter was immediately taken up for consideration and determination. The case was heard as soon as possible, considering the other matters pending before the court, and there was not any suggestion on the part of the relator or anyone that the utmost expedition was not used in bringing the matter to issue and hearing. At the time when the case was set for hearing, January 3d, neither the said Barret nor the said Donovan was an officer of this state, the successor of each having been elected and inducted into office after qualification, of all of which we take judicial notice.

The suit must abate and be dismissed. The authorities are somewhat divided as to the question whether or not *mandamus* proceedings abate upon the resignation or termination of the term of the ministerial officer, but we believe that reason and the weight of authority are in support of the position we take. Whether or not the suit may be revived, and the alternative writ directed to the new incumbent or incumbents, it is not necessary for us to decide; but, certainly, in the absence of any notice to a person holding a public office, he may not be required by this court to do something that somebody else has failed to do, or be coerced into action which has never been demanded of him.

Mr. High, in his work on Extraordinary Legal Remedies, second edition, section 441, says that where the officer goes out of office before the determination of the *mandamus* proceeding, and before judgment therein, and the action is not revived against his successor, it is improper for the court to give judgment against him as if he were still in office, and to award a peremptory *mandamus* against both him and his successor in office, since he may properly object that he no longer possesses the power to execute the demands of the writ.

In the case of *Cox, the Secretary of the Interior, v. United States ex rel. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579, being in review of *mandamus* proceedings from the supreme court of the District of Columbia, the court said: "Service was made upon O. H. Browning, Secretary of the Interior; but the fact is conceded or not denied that he had resigned and

gone out of office four months before the decision of the court was announced. When he resigned, of course, the suit abated; but the court gave judgment against him as if he were still in office, and decreed that the writ of *mandamus* should be directed to him and to his successor in the office. Complaint may well be made by that party that he no longer possesses the power to execute the commands of the writ, and the present secretary may well complain that he is adjudged to be in default, though he never refused to allow the relator to purchase the land, and that the judgment was rendered against him without notice and without any opportunity to be heard. Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts; and the better opinion is that a judgment rendered without notice may be shown to be void when brought collaterally before the court as evidence."

In the *Boutwell Case*, 17 Wall. 604, 21 L. Ed. 721, Mr. Justice Strong said: "The office of a writ of *mandamus* is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may * * * have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards, and what it seeks to enforce by a writ of *mandamus*, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply

with such demand. * * * Thus it is the personal default of the defendant that warrants impetration of the writ, and, if a peremptory *mandamus* be awarded, the costs must fall upon the defendant." Justice Strong further says that "it necessarily follows from this that, on the death or retirement from office of the original defendant, the writ must abate, in the absence of any statutory provision to the contrary," and that the court cannot compel the defendant to perform it after his power to perform has ceased. He adds that, if a successor in office may be substituted, he might be mulcted in costs for the fault of his predecessor, without any delinquency of his own. "Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor; much less is he his predecessor's personal representative."

We have examined the case of *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521, which appears to be in conflict with the views expressed in *United States v. Boutwell* and *Secretary v. McGarrahan*, *supra*, and agree with Mr. Merrill in his work on *Mandamus*, when he says that it is difficult to reconcile the *Thompson Case* with those of *Boutwell* and *McGarrahan*. The court in the *Thompson Case* undertakes to distinguish it from the others, but we confess that we cannot understand how they are distinguishable. We believe that what the court said in the *Boutwell* and *McGarrahan Cases* is correct and supported by law and reason. We cannot find any statute which declares that the suit shall not abate.

The judgment as prayed by the relator, attempting to coerce the ex-officials into action, would be futile, for the reason that they cannot perform official duties, their successors having been inducted into office, and the judgment against the present incumbents would be void, in that they never had notice of any action pending against them.

Although we did consider the case upon its merits, as argued and submitted, and although the point as to abatement of the action was not raised by counsel on either side, nevertheless, the point having occurred to our minds during consultation, it

becomes necessary to order that the alternative writ be quashed, the writ of mandate be denied, and the proceeding dismissed, the suit having abated. There seems to be no alternative. It is so ordered.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied March 1, 1905.

STATE EX REL. CITY OF BUTTE ET AL., RELATORS, v. DIS-
TRICT COURT OF SECOND JUDICIAL DISTRICT
ET AL., RESPONDENTS.

(No. 2,157.)

(Submitted January 31, 1905. Decided February 6, 1905.)

*Habeas Corpus—Extent of Relief—District Court—Jurisdic-
tion.*

Habeas Corpus—Its Object.

1. The only object sought, and the only relief that can be granted, in *habeas corpus* proceedings, is the release of the complainant from unlawful custody.

District Courts—Habeas Corpus—For What Purpose It may not be Used.

2. The district court may not use the writ of *habeas corpus* for the purpose of reviewing the action of a committing magistrate in applying a deposit, in lieu of bail, to the payment of a fine assessed against complainant; nor has it jurisdiction to determine, under the writ, who is entitled to the money, or direct the city treasurer, to whom it had been paid, to refund it to complainant.

ORIGINAL application for a writ of *certiorari* by the state, on the relation of the city of Butte and M. A. Berger, treasurer of said city, to annul an order made by Honorable Michael Donlan, judge of the district court of the second judicial district, in *habeas corpus* proceedings. Order annulled in part.

Mr. J. F. Davies, for Relators.

Mr. James H. Baldwin, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *certiorari*. One May Fox was on January 20, 1905, convicted in the police court of the city of Butte of the crime of being an inmate of a house of prostitution in said city, in violation of Ordinance No. 150, entitled "An ordinance relating to the suppression of houses of prostitution." By the judgment of the court she was sentenced to pay a fine of \$100, and in default thereof to be committed to the city jail for the period of fifty days to satisfy the fine, at the rate of \$2 per day. She defaulted in the payment of the fine, and was committed to jail, and was there confined by the chief of police, Thomas Mulholland. Upon her arrest the sum of \$100 had been deposited, either by herself or by some one in her behalf, as bail to secure her appearance on the day of the trial. Upon being committed to jail she applied to the district court of Silver Bow county for a writ of *habeas corpus*, and for a writ of *certiorari* in aid thereof, to secure her release. Upon a hearing in that court such proceedings were had that the court made an order discharging her from custody, after dismissing the *certiorari* proceedings. This order was made upon the confession of the chief of police, Mulholland, that the detention of the complainant was illegal. In the meantime the \$100 deposited as bail for the appearance of May Fox, the complainant, had been applied by the police court in satisfaction of the fine, and had been paid to the city treasurer. After ordering the discharge of the complainant under the writ, the court made an additional order requiring the city treasurer to refund to the complainant, or to the person presenting receipt therefor, the said sum of \$100 deposited as bail for the complainant. Thereupon application was made to this court for this writ, to annul this portion of the order on the ground that it was in excess of jurisdiction.

It is manifest that the order, in so far as it undertook to deal with or make disposition of the deposit made for bail by the complainant, was in excess of jurisdiction. In *habeas corpus* proceedings the only object sought, and the only relief that can

be granted, is the release of the complainant from unlawful custody. The court cannot use the writ for the purpose of review. It had no jurisdiction of the city treasurer, nor of the police magistrate, under and by virtue of which it could direct them, or either of them, to make any disposition of the fund. Nor could the court, under the writ, determine any question with reference to who was entitled to the money.

It must follow, therefore, that, in so far as it undertook to make a disposition of the money, it acted in excess of jurisdiction, and the order is void. To this extent, therefore, it must be annulled. It is so ordered.

Order annulled in part.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, RELATOR, v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT, RESPONDENT.

(No. 2,154.)

(Submitted January 27, 1905. Decided February 6, 1905.)

Costs—Order of Taxation—Validity—Certiorari—Appeal.

Judgment—Amendment After Entry—Appealable Order.

1. An order amending a judgment already entered is a special order after final judgment, and therefore appealable under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Session Laws 1899, p. 146).

Judgment—Appeal—Affirmance—District Courts—Reopening Case.

2. When, upon appeal to the supreme court, a judgment of the district court has been reviewed and affirmed, or a specific judgment ordered to be entered in the case, it becomes final, and the district court cannot then proceed to reopen the case and allow new issues to be framed to try rights already settled, or amend or modify the judgment of the supreme court so as to enlarge or narrow its scope.

Certiorari—When Proper Remedy—Order Taxing Costs—Appeal.

3. Code of Civil Procedure, as amended by Session Laws of 1899, page 146, authorizes an appeal from a special order after final judgment. After an affirmance of a judgment on appeal the trial court made an order allowing certain costs that had not been previously

allowed; the order, however, did not amend the judgment. *Held*, that *certiorari* was the proper remedy to review the order so made, it being merely an order taxing costs, not appealable, and no appeal being permissible from the judgment for the purpose of reviewing the order, since it was not included in the judgment already reviewed on appeal.

District Courts—Order Taxing Costs—Omission of Item—Remedy.

4. After an allowance by the district court for necessary costs and disbursements has been made to a party, and a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omission corrected, or an appeal from the judgment to have the error thus committed reviewed, otherwise he becomes bound by the judgment.

District Courts—Order Taxing Costs—Omission of Items—Inadvertence—Appeal.

5. Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him, which judgment had been affirmed on appeal by defendant, the trial court had no authority, after affirmance, to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court, since the Code of Civil Procedure, section 774, providing that the court may relieve a party from an order made through his mistake, inadvertence or excusable neglect, applies only to the mistake, inadvertence, surprise or excusable neglect of the party litigant and not of the court.

District Courts—Order—Inadvertence—Relief—When.

6. By the express provisions of Code of Civil Procedure, section 774, the trial court cannot relieve a party from an order entered against him by his inadvertence, etc., unless application is made within six months.

Certiorari by the state, on the relation of the Boston and Montana Consolidated Copper and Silver Mining Company, to review an order of the district court of the second judicial district for the county of Silver Bow taxing certain costs against relator in an action against it by the Montana Ore Purchasing Company. Order annulled.

Messrs. Forbis & Evans, for Relator.

Mr. James M. Denny, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *certiorari* to annul an order taxing costs. On February 14, 1900, judgment was entered in the district court of Silver Bow county in favor of the plaintiff in a cause entitled "*Montana Ore Purchasing Company v. Boston and Montana Consolidated Copper and Silver Mining Com-*

pany," the relator herein. The findings in the cause had theretofore, on December 28, 1899, been made and filed with the clerk. On January 2, 1900, the plaintiff, under the provisions of the statute (Code of Civil Proc., sec. 1867), had filed with the clerk its memorandum of costs and disbursements, and served a copy upon the defendant. Included in the memorandum were several items disbursed for maps used upon the hearing, and deemed necessary for that purpose. The total amount of these items was \$5,184.57. On January 6th the defendant moved the court to tax the costs, making specific objections to the items, among others, charged for maps. On September 14, 1900, the court made an order taxing the costs. This order disallowed many other items, but made no reference to those charged for maps. They were all omitted from the list of items found to be proper expenses and disbursements. The amount allowed was ordered to be and was included in the judgment. Whether these items were omitted by oversight of the court or intentionally does not appear. The defendant thereupon appealed to this court from the judgment and an order denying a new trial. This court affirmed the action of the district court in the cause, except that it was directed to modify the judgment by disallowing many items of costs and in one other particular. (*Montana Ore Pur. Co. v. Boston and Montana Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114, 27 Mont. 536, 71 Pac. 1005.) *Remittitur* issued from this court on April 4, 1903. Thereupon the plaintiff moved the district court to pass upon and decide the defendant's objections to these items of plaintiff's cost-bill filed on January 2, 1900, said items being designated as "costs of preparing maps used in trial of case and necessary to trial," and to enter an order allowing said costs to the plaintiff. This motion was based upon the memorandum originally filed, the defendant's objections thereto, and the evidence submitted on the hearing of the original motion to tax costs. After having had the motion under consideration, the court, on December 29, 1904, entered an order in the minutes allowing the items claimed to the amount of \$2,119.95. In effect, the order amends and modifies the order

of September 14, 1900, but does not direct that the additional amount be included in the judgment, or that the judgment be modified or amended so as to include it. .

It is difficult to determine what the intention of the court was in making the order. If it was the purpose to amend the judgment ordered to be entered by this court, and, presumably, so entered, the order does not say so, for it contains no provision to effectuate this purpose, and under its terms the clerk was not authorized to do anything with reference to the judgment. Had the order contained such a direction, a wholly different question would have been presented as to the remedy by which the relator could have it reviewed.

An order amending a judgment already entered is a special order after final judgment, and therefore appealable under section 1722 of the Code of Civil Procedure, as amended by Act of 1899 (Session Laws of 1899, p. 146). As it is, the order does not purport to do more than allow an additional amount for costs and disbursements; in other words, it is an order taxing costs. It is therefore not an appealable order (*Montana Ore Pur. Co. v. Boston and Montana Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Murray v. Northern Pacific Ry. Co.*, 26 Mont. 268, 67 Pac. 625); for, since costs are a part of, and must be included in, the judgment, the action of the court in allowing or disallowing them, or any particular item of them, is ordinarily reviewable only on appeal from the judgment. The present order, however, cannot be reviewed by this method, for the reason that the amount allowed by it has not been included in the judgment either by amendment or modification thereof, and for the further reason that the judgment has already been reviewed on appeal, and no appeal from it will now lie.

When, upon appeal to this court, a judgment of the district court has been reviewed and affirmed, or a specific judgment has been ordered to be entered in the case, the judgment becomes final in the sense that the litigation is over and the case ended. The lower court has no further power in the premises than to carry the judgment into execution under the mandate of this

court. It cannot proceed to reopen the case, and allow new issues to be framed to try rights already settled, or amend or modify the judgment of this court so as to enlarge or narrow its scope. (Freeman on Judgments, sec. 121; *Keller v. Lewis*, 56 Cal. 466; *Heinlen v. Beans*, 73 Cal. 240, 14 Pac. 855; *Soule v. Dawes*, 14 Cal. 248; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *Ex parte Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235.)

On receiving the mandate from this court the district court must determine all questions of law or fact which necessarily arise in the proceedings to carry the judgment into execution under the specific directions given by this court. The language contained in the mandate "that such further proceedings be had in said case as, according to right and justice and the laws of the state of Montana, ought to be had," has reference to such further proceedings as may be necessary in this regard, and does not grant or contemplate the exercise of any other jurisdiction in the case. (*Ex parte Sibbald v. United States*, *supra*; *In re Washington & Georgetown R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339.)

In *Re Washington & Georgetown R. Co.*, *supra*, it was held that after the judgment of the inferior court had been affirmed on appeal it was then beyond the power of that court to amend or modify the judgment of the appellate court, and that, if such amendment were attempted, a writ of *mandamus* would lie from the appellate court to compel the execution of the judgment in the terms and according to its tenor as rendered by the appellate court.

As the district court could not amend or modify the judgment, so it was without power to take up again the order of September 14th, and, by amendment thereto or enlargement of its scope, adjudicate questions which should have been settled and determined at the time it was made. If the plaintiff was not satisfied with the allowance made for its necessary costs and disbursements by the terms of that order, no matter whether the court omitted the items in question inadvertently or inten-

tionally, its remedy was to apply to the court at the time to have the omission corrected, or to appeal from the judgment, and have the error thus committed reviewed. Having submitted to the order made at that time adjusting costs, the plaintiff thereby became bound by the judgment, and could not, after it was affirmed by this court, have the case re-examined in any respect, even though the judgment were erroneous.

Counsel contend that the court had authority, under section 774 of the Code of Civil Procedure, to relieve the plaintiff by correcting an order made to its prejudice through inadvertence or mistake of the court. The section referred to provides for such relief only when the order or proceeding complained of was made or taken through the inadvertence, mistake, surprise or excusable neglect *of the party himself*; and even then the application must be made within six months.

From no point of view had the court the power to make any order in the premises. As an appeal does not lie from the order, the present application furnishes the only adequate remedy. It follows that the order must be annulled.

Order annulled.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

LANDER, APPELLANT, v. SHEEHAN, RESPONDENT.

(No. 2,051.)

(Submitted December 20, 1904. Decided February 6, 1905.)

*Partnership—Business Name—Necessity for Registration—
Sale—Action for Price—Evidence—Admission—Instruc-
tions—"Seller's Praise"—Measure of Damages.*

Partnership—Use of Fictitious Business Name.

1. Sections 3280 and 3281 of the Code of Civil Procedure, requiring a partnership transacting business in a fictitious name, or under a designation not showing the names of the persons interested, to file a certificate stating the facts, and to publish the same, do not apply

to a person who uses as a business name his surname, followed by the words "Furniture & Carpet Co.," and who is the sole owner of the business.

Sales—Warranty—Evidence—Jury.

2. In an action for the price of a stove alleged by defendant to be inferior to the warranty, testimony as to experiments by witness at cooking with the stove, and that the "things I tried to cook were not fit to eat, we couldn't eat them, I could not do anything with the stove," was not an invasion of the province of the jury as drawing conclusions from the evidence.

Sales—Evidence—Trademark.

3. In an action for the price of a stove alleged by defendant to have been worthless, the admission of testimony of a third person that he had purchased a stove of plaintiff bearing the same trademark, which proved to be worthless, was error.

Sales—Instructions—Seller's Praise—Warranty—Opinion.

4. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by which the salesman indulged in an expression of opinion concerning the merits of the stove, does not constitute a warranty, and it is for the jury to determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the stove was made as one of fact or of mere opinion.

Sales—Breach of Warranty—Measure of Damages—Instructions.

5. Where the defense in an action for the price of a stove is framed so as to give defendant the benefit of section 4314 of the Code of Civil Procedure, in relation to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages, under section 4313, for the breach of warranty of the quality of the articles sold.

Instructions—Jury must Obey.

6. The jury must obey the instructions of the court, whether correct or not.

Appeal from District Court, Silver Bow County, Wm. Clancy, Judge.

ACTION by George S. Lander, doing business as the Lander Furniture and Carpet Company, against Pat Sheehan. From a judgment for defendant and an order denying a new trial plaintiff appeals. Reversed.

Mr. Peter Breen and Mr. J. J. Lynch, for Respondent.

Mr. John Lindsay, and Mr. Jas. H. Baldwin, for Appellant.

MR. COMMISSIONER BLAKE prepared the opinion for the court.

This action was commenced by plaintiff (appellant) in the justice's court, by the filing October 23, 1901, of the following account:

"Butte, Montana, Aug. 23, 1901.

"M. Pat Sheehan, 217 N. Jackson, Bought of Geo. S. Lander, doing business as Lander Furniture & Carpet Co., Furniture, Bedding, Carpets, Stoves, Tin and Granite Ware, Crockery, Lamps and General Household Goods.

44 to 48 East Broadway. Telephone 335.

1 Steel Range...	\$35 00
1 Taper.....	75
2 Jts. Pipe.....	1 00
1 Elbow.....	50
1 Collar	10

\$37 35"

The answer filed in that court admits that defendant (respondent) bought the articles described in the account, and says that plaintiff at the time of the sale warranted the range "to do good cooking and baking"; but that the range "was entirely worthless," did not "cook and bake at all," and was "inferior and defective." It further alleged that defendant notified plaintiff that the range was worthless and defective, and set forth a counterclaim for damages caused by the loss of food through the bad cooking of the range. In the justice's court judgment was entered for defendant for the sum of \$37.55, and plaintiff appealed.

In the district court the answer was amended as follows: "By way of amendment to the answer herein on file, by permission of the court first had and obtained, the defendant files this, his amendment, to said answer, and alleges: That one Lander, the plaintiff in this action, is doing business now, and at the time mentioned in the complaint and answer herein was doing business, under the name of 'Lander Furniture and Carpet Company,' in Silver Bow county, Montana, as its principal place of business, said name being the name by which said action was

brought herein, and said name does not show the names of the parties interested in the said business; that said plaintiff has not filed in the county of Silver Bow, or in any other county of the state of Montana, any certificate showing the names of the parties interested in said Lander Furniture and Carpet Company, nor has any notice been published as required by law of said fact; and the said plaintiff has in no wise complied with the provisions of sections 3280, 3281, of the Civil Code of the state of Montana." Judgment was entered on a verdict for defendant in the sum of \$10, and plaintiff appealed from the order overruling his motion for a new trial.

The sections of the Civil Code referred to in this answer require a partnership transacting business under a fictitious name, or a designation not showing the names of the persons interested in the business, to file a certificate stating the facts, and publish the same, and provide that persons who do not comply with these provisions shall not maintain any action upon contracts. George S. Lander testified on the trial: "I am acquainted with the Lander Furniture and Carpet Company. I am proprietor of the same. I am the sole owner." The sections of the statute have no application. They apply only to partnerships doing business under fictitious names or titles not revealing the names of the persons interested in the business.

A salesman in the store of plaintiff sold the range and "pipe going with it," and we quote from the testimony of Lander: "The man who sold this stove was working for me as agent. * * * Among his other duties was to sell stoves. * * * We guarantee a stove to bake and cook. This man had authority to guarantee the stove to bake and cook." The wife of defendant made the purchase, and testified, without any objection: "I am acquainted with the Lander Furniture and Carpet Company. I have been acquainted with them since the time I purchased the stove. That was about the 8th or 9th of August. I bought this stove at their store. I do not know the name of the man that made the sale to me, but I would know the man when I saw him. It was a man in the store. It was not Mr. Lander himself. At the time I made this purchase I

asked the man if he had a good range, and he showed me the Universal, and recommended it to me, and told me if it was not good—a good baker, and a good stove—he told me if I would take the stove, and if it was not satisfactory, he would take it back; that we should not keep it; that his company would not let me do it. They delivered the stove. The stove was no good. It would not bake. I kept the stove about three weeks. It was in the house about three weeks. I notified the Lander Furniture and Carpet Company, and I told him to take his stove away; that I couldn't do anything with it. I made that report to the collector. He sent a man with a bill before he let me try it. I told him to notify the Lander Furniture and Carpet Company to come and take it away. The agreement was that I was to try the stove until it was proven satisfactory, then I was to pay for it." The testimony of this witness was not contradicted or impeached, the salesman conducting the sale was not called as a witness, and the plaintiff did not offer any evidence to prove that the range was fit for any purpose.

Miss Brown testified: "My occupation is cooking. I have been engaged in the occupation a good many years, I guess. * * * These things I tried to cook were not fit to eat. We couldn't eat them. They were thrown out. I could not do anything with this stove." The appellant insists that the witness, by expressing her opinion about the working of the range, invaded the province of the jury to draw conclusions from the evidence. The above matters were clearly within her knowledge, and her answers were confined to her observations and experience as a cook in the employment of defendant. The objection of appellant to the admission of this testimony was properly overruled.

Two witnesses—Waldrip and his wife—testified under objection that they had in their house two years a range bought of appellant, and bearing the same trademark as that sold to respondent, and that it was worthless. The court erred in permitting this testimony to be introduced. (*Fox v. Harvester Works*, 83 Cal. 333, 23 Pac. 295; *Stockton Works v. Glens*

Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; *Murray v. Brooks*, 41 Iowa, 45.) In *Stockton Works v. Glens Falls Ins. Co.*, *supra*, the court said: "Defendant endeavored to show that the destroyed machines were worthless by showing how other machines of similar pattern built by plaintiff had worked. This evidence was refused upon an objection that the salability or cost of construction or value of one machine cannot be shown by comparison with another. * * * We think the ruling was correct."

The court gave the instruction numbered 3, incorporating section 2370 of the Civil Code, to wit: "The jury are instructed that a warranty is an engagement by which a seller assures to the buyer the existence of some facts affecting the transaction, whether past, present, or future." At the request of appellant the court gave the instruction numbered 4, to wit: "The jury are instructed that, to create an express warranty the word 'warrant' need not be used, nor any particular words necessary. Any affirmation (other than mere dealers' talk) made at the time of the sale as to the quality or condition of the thing sold will be treated as a warranty, if it was so intended, and the purchaser bought on the good faith of such affirmation; and whether it was so intended and the purchaser acted upon it are questions of fact for the jury." This is derived from the opinion of the court in *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687. (See, also, Biddle on Warranties, sec. 35, and cases cited; *Mason v. Chappell*, 15 Gratt. 572; *Osgood v. Lewis*, 2 Har. & G. 495; *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172.)

The appellant complains that instruction numbered 8 was refused, to wit: "The jury are instructed that mere statements on behalf of the plaintiff or its agents, made at the time of the sale, and by which was expressed a favorable opinion of the article sold, or by which the plaintiff or its agents indulged in an expression of an opinion concerning the merits of the article sold, does not create a warranty. This would be mere praise of its own property; the simple commendation which is allowable in making a trade—i. e., is mere dealer's talk, and does not amount

to a warranty." The court evidently entertained the view that this instruction was in conflict with said instructions numbered 3 and 4, and might mislead the jury. The effect of this language may be comprehended by considering the authorities supporting the doctrine of said instructions numbered 3 and 4, as well as the limitations of the words "dealer's talk" or "seller's praise."

Mr. Biddle, in Warranties in the Sale of Chattels, says: "It has also been stated above [referring to said section 35] that a warranty must be a statement of a *fact* upon which the buyer relies in making his purchase; consequently, words of description, or certain vague expressions of opinion, made by the seller, as to the quality or value of his goods, or for the simple commendation of them, are not to be treated as warranties, and the maxim is, '*Simplex commendatio non obligat.*'" (Section 43.)

In *Mason v. Chappell*, *supra*, the court said: "Any distinct affirmation of quality made by the vendor, at the time of the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed, and an inducement to him to make the purchase, is, if accordingly received, and relied on, and acted upon by the purchaser, an express warranty. But no affirmation, however strong, will constitute a warranty, unless it was so intended. * * * It is often very difficult to determine whether an affirmation was intended as a warranty or as a mere expression of opinion."

In *Bishop v. Small*, 63 Me. 12, the court said: "Most of them (representations) are too preposterous to believe. None of them are representations of facts, affecting the quality of the article sold, known to the vendor, but unknown to the vendee, and such as a vendee using common care would be deceived by. They are only 'dealer's talk.'"

Mr. Mechem, in his work on Sales, says: "The doctrine of immunity to seller's praise is one which is not to be pressed too far. The tendency of the later cases is to attach more consequence to the seller's affirmations than is given to them in the earlier ones, and it is usually a question for the jury whether his positive affirmations even of worth or value were, under the cir-

cumstances, to be regarded as the mere expression of his opinion, or as such reliance-begetting representations as constitute a warranty." (Section 1246. See, also, Tiedeman on Sales, sec. 166; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113.)

Inasmuch as the case must be remanded for a new trial, we think an instruction similar to said instruction numbered 8 should be given, with the qualification that the jury must determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the range was made as one of fact or of mere opinion.

It is contended that the court erred in modifying the instruction numbered 6, which stated, in substance, that, if the range had a trademark, "the law implies but two warranties"—that the seller has a good and unencumbered title, and that the trademark is genuine, and lawfully used. The modification is as follows: "But in this case you may further find, if you can, from all the evidence, that this stove would bake and cook if properly handled, and so warranted by the plaintiff." The jury might have been misled by the use without any qualification of the phrase "but two warranties." The stove had a trademark, the "Universal Range," and their attention was therefore directed to the express warranty sought to be shown in the testimony. The modification is expressed in obscure phrases rendering the meaning doubtful, but appellant could not have been prejudiced.

The court gave the following instruction at the request of appellant: "The jury are instructed that in an action brought upon a warranty the true measure of damages is the difference between the value which the thing sold would have had at the time of the sale if it had been sound, or corresponding to the warranty, and its actual value with the defect warranted against, if any such has been proved." No other instruction was given or requested upon the measure of damages, and it should be observed that this was not an action upon a warranty, although the counterclaim may be treated as such when the rights of the parties are adjudicated. Judgment was entered for defendant upon the counterclaim in the sum of \$10, and the appellant

maintains that the verdict is contrary to the instruction, and therefore against law. There is no difference, in legal effect, between this instruction and section 4313 of the Civil Code, but the counterclaim was framed in order that defendant might have the benefit of section 4314 of the Civil Code, to wit: "The detriment caused by the breach of a warranty of the fitness of an article of personal property for particular purposes is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." Respondent did not pay any money or execute an obligation to appellant on account of this transaction. We do not hesitate to declare that this instruction is incomplete and misleading. The jury, however, must obey the instructions of the court. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836; *McAllister v. Rocky Fork C. Co.*; 31 Mont. 359, 78 Pac. 595.) There is no testimony showing the difference between the value which said property would have had when sold if it corresponded to the warranty and its actual value when the defect warranted against was ascertained. It is apparent from the verdict that the range and pipe were considered worthless, and damages were assessed in accordance with the counterclaim. If the jury decided that the articles sold had no value, they had no authority, under the instruction, to assess any damages prayed for in the counterclaim, and the verdict was against the law.

We recommend that the order appealed from overruling the motion for a new trial be reversed, and the cause be remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is reversed, and the cause remanded.

Reversed and remanded.

MR. JUSTICE MILBURN: I concur in the result.

STATE EX REL. DOUGAN, RELATOR, v. DISTRICT COURT
OF EIGHTH JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,151.)

(Submitted January 16, 1905. Decided February 7, 1905.)

*Contempt Proceedings—Violation of Restraining Order—Ali-
mony—Failure to Pay—Review—Supervisory Control.*

1. An order made in a divorce suit restraining defendant from disposing of his property was so modified as to allow him to mortgage certain property in order to comply with an order of court awarding plaintiff alimony and counsel fees, and to pay certain debts. Defendant mortgaged the property, paid counsel fees and two months' alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses, failing thereafter to pay the alimony awarded. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in such an arbitrary or unlawful manner as to entitle defendant to a writ of supervisory control.

ORIGINAL application by the state on the relation of Henry G. Dougan, for a writ of supervisory control against the district court of the eighth judicial district and Honorable Jerry B. Leslie, judge thereof. Denied.

Mr. John W. Stanton and *Mr. Geo. I. Danks*, for Relator.

Mr. James W. Freeman, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Original application for a writ of supervisory control. On June 7, 1904, one Emily F. Dougan commenced an action for divorce against Henry G. Dougan in the district court of Cascade county. On June 8th an order was made by the court restraining the defendant from selling, encumbering, transferring, or in any manner disposing of any of his property. On June 15th the defendant filed his answer and cross-complaint, and on June 30th the plaintiff filed her reply thereto. On June 7th the plaintiff made application for alimony and counsel fees, and

on June 20th a hearing upon this application was had, the defendant and his counsel being present. The court thereupon made an order directing the defendant to pay to the plaintiff \$50 for counsel fees and expense of suit, and \$40 per month for alimony pending the trial of the cause. On June 21st the court made an order modifying the restraining order which it had theretofore made by permitting the defendant to mortgage his personal property for the sum of \$600 in order to meet and comply with the order for alimony and counsel fees made on June 20th, and for the purpose of paying certain debts. On November 21st the plaintiff filed her affidavit showing that the defendant had failed to comply with the order of June 20th in that he had failed to make any payment of alimony after the month of July. An order to show cause was issued and served. Thereafter the defendant moved the court to modify the order allowing alimony. So far as this record shows, this motion was not acted upon by the court. The order to show cause having been served, a hearing was had thereon, and upon such hearing the defendant testified that pursuant to the order of the court made on June 21st he had mortgaged his personal property and had secured \$600, which he had disposed of in the following manner: \$50 paid to the plaintiff for attorney's fee, \$40 alimony paid to plaintiff for the month of June, and a like amount for the month of July; that he had paid \$156.05 to a bank in Great Falls, and \$88.25 to the Northern Pacific Railway Company, each of these last amounts being pre-existing debts. The balance of the money, amounting to \$374.30, the defendant had paid out for his own current expenses and his own attorney's fees. The court thereupon adjudged the defendant guilty of contempt of court in failing to pay to the plaintiff alimony for the months of August, September, October and November, and upon the defendant's further failure to comply with the order he was committed to jail. Thereafter application was made to this court to review and annul the order of the court holding the defendant guilty of contempt and directing his punishment.

The object of the hearing on June 20th was to determine whether the plaintiff was entitled to alimony and counsel fees,

and, if so, to ascertain the amounts thereof. It was then determined that plaintiff was entitled to these allowances, and the amounts were fixed. It appearing to the court that the defendant was unable to comply with the order, as he was then prohibited from disposing of his property in any manner, it modified the restraining order to the extent that the defendant was given permission to mortgage his property to the extent of \$600, in order that he might pay certain pre-existing debts and comply with the order for payment of alimony and counsel fees. The particular pre-existing debts which the defendant was permitted to pay are not specifically mentioned in the order, but the only pre-existing debts which the defendant paid, so far as this record shows, were a debt of \$156.05, due one of the banks in Great Falls, and the sum of \$88.25, due to the Northern Pacific Railway Company. He did pay to the plaintiff \$50 attorney's fee and \$80 for monthly installments of alimony. These payments amount to \$374.30, and, had the defendant further complied with the order of court by paying to the plaintiff alimony due for the months of August, September, October and November, he would still have had left in his possession of the \$600 the sum of \$65.70; but, instead of complying with the order or seeking its modification, he dissipated the money for his current expenses, and then, after he was in default, asked the court for a modification of its order. Upon the hearing of the order to show cause why he should not be punished for contempt defendant entirely failed to show that he had acted in good faith in his attempt to comply with the previous order of the court, and certainly in this proceeding he has failed entirely to show that in adjudging him guilty of contempt and directing his punishment therefor the court acted in an arbitrary or unlawful manner.

The application for the writ is denied and the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

STATE EX REL. MONTANA CENTRAL RAILWAY COMPANY, RELATOR, v. DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT ET AL., RESPONDENTS.

(No. 2,120.)

(Submitted November 28, 1904. Decided February 10, 1905.)

32	37
33	146
33	152

Pleadings—New Matter—Failure to Reply—Motion for Judgment on Pleadings—Dismissal by Plaintiff—Appeal from Judgment—Mandamus.

32	37
137	59
38	106

Pleadings—Answer—Contributory Negligence—Special Defense.

1. In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in defendant's answer.

Pleadings—Negligence—Fellow-servant—Special Defense.

2. *Quære*: Is the defense of negligence of a fellow-servant in an action for damages for injury of person, a special defense which must be pleaded?

Pleadings—Answer—Contributory Negligence—New Matter—Failure to Reply—Complaint—Anticipatory Denials.

3. Under Code of Civil Procedure, section 720, as amended by Session Laws of 1899, page 142, allegations in the answer of contributory negligence, in an action for personal injuries, constitute new matter, the truth of which is admitted by failure of plaintiff to reply thereto, and any mere anticipatory denials in the complaint of the facts constituting such new matter are insufficient.

What may Constitute a "Trial."

4. The argument and submission to the district court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within Code of Civil Procedure, section 1004, subdivision 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff "at any time before trial."

Dismissal Without Prejudice—When too Late.

5. Where a motion for judgment on the pleadings has been made by defendant, under the provisions of Code of Civil Procedure, section 722, as amended by Session Laws of 1899, page 142, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within Code of Civil Procedure, section 1004, subdivision 1.

Dismissal Without Prejudice—Not Final Judgment—Minutes—Appeal.

6. The mere entry in the minutes of the court of an order, under Code of Civil Procedure, section 1004, that an action "is dismissed without prejudice, as per praecipe filed" by plaintiff, is not a final judgment from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could have been entered.

Dismissal of Action—Mandamus—Reinstatement of Cause.

7. *Held*, that where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the action without prejudice on plaintiff's motion, *mandamus* will lie to require the court to reinstate the cause, and determine defendant's motion, as an appeal from a judgment of dismissal, if available, would be inadequate in that it would not present for the determination of the appellate court the question as to whether or not the district court should pass upon the motion for judgment on the pleadings.

Mandamus—Remedy—Plain, Speedy and Adequate.

8. If the remedy by appeal, or any other method than *mandamus*, is not plain, speedy and adequate, *mandamus* will lie, the case otherwise being a proper one.

Mandamus—When It Will not Lie.

9. *Obiter*: Where a district court has acted in a given particular, *mandamus* will not lie to correct the error in so acting.

ORIGINAL proceedings for *mandamus*, on the relation of the Montana Central Railway Company against the district court of the eighth judicial district in and for the county of Cascade, and J. B. Leslie, judge thereof. Writ granted.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

Some time prior to January 29, 1904, Theodore H. Kittock commenced an action in the district court of Lewis and Clarke county against the Montana Central Railway Company to recover damages for personal injuries received by the plaintiff while in the employment of the defendant company, and on the date last above mentioned filed in court his second amended complaint. On February 17th the defendant filed its answer, denying the material allegations of the complaint, and particularly denying any negligence on the part of the defendant company, and pleading, first, contributory negligence on the part of the plaintiff, and, second, that, if any negligence other than plaintiff's contributed to or occasioned plaintiff's injuries, it was the negligence of plaintiff's fellow-servants. On February 29th, plaintiff's counsel served upon defendant a paper designated "Plaintiff's Note of Issue," which, after giving the title of the court and cause, is as follows: "Issue joined and settled February 29th, 1904. Charles J. Geier, attorney for plaintiff. Sir—Please place same on the trial calendar. Dated February 29, 1904. To the clerk of this court." This note of issue was

sent to defendant's counsel for his signature, but returned unsigned by him, and filed in court on March 4th. The cause was thereupon transferred to the district court of Cascade county. No reply or demurrer to defendant's answer was ever served or filed.

On March 25th the defendant served upon plaintiff and filed in court its motion for judgment on the pleadings, based upon the ground that its answer contained allegations of new matter which were admitted by the plaintiff by his failure to reply. This motion was argued and submitted to the court, and by it taken under advisement; and thereafter, but before a decision thereon was made by the court, the plaintiff filed his *praecipe* for a dismissal of the case as follows: "To the clerk of said court. Please dismiss the above-entitled action without prejudice." On the same day the court made its order as follows: "It is hereby ordered that the above-entitled action be, and the same is, dismissed, without prejudice, as per *praecipe* filed"; and the court thereupon refused to pass upon the motion for judgment on the pleadings. Thereafter defendant commenced this proceeding seeking a writ of mandate to compel the district court to reinstate said action upon the calendar and determine the motion for judgment on the pleadings. The cause was argued and submitted to this court upon a motion to quash the alternative writ issued.

Mr. I. Parker Veazey, for Relator.

Messrs. Downing & Roote, for Respondents.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

It is to be noted in the first instance that the defendant had pleaded in its answer contributory negligence on the part of the plaintiff and negligence of the fellow-servants of the plaintiff as special defenses. Whether the defense of negligence of a fellow-servant is a special defense which must be pleaded is unnecessary to be determined here. The authorities are conflicting upon the question. But contributory negligence

on the part of the plaintiff in an action of the character of this one is such a special defense, and must be pleaded by the defendant. This doctrine has the support of an unbroken line of authorities in this state from *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450, to the recent case of *Nord v. Boston & Montana C. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681. (See, also, 2 Current Law, 1007; 5 Ency. of Pl. & Pr. 1, and cases cited.) The pleading of this defense constituted new matter within the meaning of section 720 of the Code of Civil Procedure, as amended by an Act of the legislature approved February 22, 1899 (Sess. Laws 1899, p. 142); and any mere anticipatory denials in the complaint of the facts constituting this special defense were insufficient (*Louisville & N. R. Co. v. Paynter's Adm'r*, 26 Ky. Law Rep. 761, 82 S. W. 412), and the failure to reply to such allegations of new matter was an admission on the part of the plaintiff of the truth of the facts therein set forth if those facts were sufficiently pleaded.

Section 722 of the Code of Civil Procedure, as amended by the Act of 1899, above, provides: "If the answer contains new matter and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice, for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment," etc. The method of procedure provided in this section, namely, a motion for judgment on the pleadings, was followed, and then it became the plain legal duty of the court to pass upon such motion, involving as it did a consideration of the facts and the law of the case, the same having been argued and submitted, unless something intervened to relieve the court of this duty; and the only thing suggested is the application of the plaintiff to dismiss his action and the order of the court made thereon, the application having been filed and the order made after the motion for judgment on the pleadings had been argued and submitted to the court for its decision.

Section 1004 of the Code of Civil Procedure provides, among other things: "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time before trial," etc.

1. Did the plaintiff move to dismiss his action before trial? As satisfactory a definition of the word "trial" as we are able to find is one which has been adopted, in substance at least, in the statutes of various states and by the courts of last resort of a large number of states. A trial is the examination before a competent tribunal, according to law, of the facts or law in issue in a cause, for the purpose of determining such issue. (21 Ency. of Pl. & Pr. 956; *Anderson v. Pennie*, 32 Cal. 266; *Tre-gambo v. Comanche M. & M. Co.*, 57 Cal. 501; *Crossland v. Ad-mire*, 118 Mo. 87, 24 S. W. 154; *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504; *Mathews v. Clayton Co.*, 79 Iowa, 510, 44 N. W. 722; *Railway Co. v. Thurstin*, 44 Ohio St. 525, 9 N. E. 232.) Under the provisions of section 722, above, as amended, the defendant was entitled to judgment if his special defense was sufficiently pleaded; and upon his motion for judgment the only questions presented to the court for determination were the sufficiency of the pleading of this special defense, and the particular judgment to which defendant was entitled, if the plea was found to be sufficient. These questions the court must determine upon the pleadings themselves. The aid of a referee or a jury is allowed only for the purpose of determining the amount involved in the controversy. (Section 722, as amended, above.)

While we are unable to find any case similar to the one at bar, a number of cases somewhat analogous have been called to our attention, as well as a construction of statutes either directly similar to our own or involving provisions so nearly like them as to be of some assistance in reaching our determination. Section 3 of an Act of Congress approved March 3, 1875 (18 Stat. 471, c. 137 [U. S. Comp. St. 1901, p. 510]), respecting the removal of causes from the state to federal courts, provides for such removal if the party applying shall make his application in the state court "at or before the term at which the suit could be first tried and before the trial." In *Babbitt v. Clark*, 103 U. S. 606, 26 L. Ed. 507, the supreme court of the United States, in construing the above section of the Act of 1875, held that, after an issue of law had been submitted to the court, the

case could not then be removed to the federal court, as the application for removal did not come "before the trial."

In *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491, the same court held that the hearing of a general demurrer to the complaint was a trial within the meaning of the removal statute, basing its decision upon the fact that the determination of the questions presented by the demurrer would finally dispose of the case as stated in the complaint on its merits, unless leave of court was had to amend or plead over. The court said: "The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding." The doctrine of this case was specifically affirmed in *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883.

By an Act of Congress approved March 3, 1887 (24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 510]), the Act of 1875, above, was amended, particularly with reference to the removal of causes based upon the ground of local prejudice. In the amended Act it is provided that the application must be made in the state court "at any time before the trial." In *Lookout Mt. R. Co. v. Houston* (C. C.), 32 Fed. 711, this statute was construed, and it was there held that the hearing on a demurrer which went to the entire complaint was a trial within the meaning of the Act of 1887, above.

So far as the particular language under consideration is concerned, section 581 of the California Code of Civil Procedure is identical with our section 1004, above; and in *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091, a consideration of the phrase "at any time before trial" was had, and, comparing it with the language of the Act of Congress of 1875, above, the supreme court of California said: "The language of our Code is 'at any time before trial.' There is no perceivable difference between the two Acts. We cannot see why it is not true, as was said in *Tregambo v. Mining Co.*, *supra* [57 Cal. 501], that, 'when a court hears and determines any issue of * * * law for the purpose of determining the rights of the parties, it may be considered a trial.'" After referring to like decisions made by the supreme court of Ohio (*Beaumont v. Herrick*, 24

Ohio St. 446) and Nebraska (*State v. Scott*, 22 Neb. 628, 36 N. W. 121), the court further says: "In none of the California cases coming under our observation has the precise question been decided, which is sufficient apology for having gone into the matter at some length. In our opinion, the subdivision of the section 581 in question cannot be restricted in its meaning to trials of the merits after answer, for there may be such a trial on a general demurrer to the complaint as will effectually dispose of the case where the plaintiff has properly alleged all the facts which constitute his cause of action. If the demurrer is sustained, he stands on his pleading, and submits to judgment on the demurrer, and, if not satisfied, has his remedy by appeal. In such a case, we think there would be a trial within the meaning of the Code, and the judgment would cut off the right of dismissal unless it was first set aside, or leave given to amend."

While each of the foregoing decisions is made with reference to a general demurrer which went to the entire cause of action pleaded in the complaint, it appears to us that for the stronger reason the doctrine announced is applicable to the case under consideration; for, as we have said above, the only questions presented by the motion for judgment on the pleadings were, first, the sufficiency of the pleading of the special defense, and, second, the particular judgment to which the defendant was entitled if the defense was found to be sufficiently pleaded. These were purely questions of law, and the motion went to the entire case made by the pleadings, and its determination decided the entire case made to a much greater extent than the decision on a general demurrer; for, if the court found that the special defense was sufficiently pleaded, then in this particular instance it is quite impossible to conceive of any amendment which could be made which would relieve the plaintiff from the consequences of his failure to reply. The sufficiency of the pleading being admitted, the court could do but one thing, namely, determine the particular judgment to which the defendant was entitled.

We hold, then, that the submission of the motion for judgment on the pleadings in this case was a trial of the case within the meaning of section 1004, above, and the application made

to dismiss after the submission of the motion for judgment on the pleadings came too late. The attempt of the court to dismiss the case upon such application or *praecipe* was futile, and the order of dismissal a nullity. The cause is still pending, and the plain legal duty of the court is to reinstate it upon the calendar and determine the motion.

2. Is *mandamus* the proper remedy? Counsel for plaintiff contend that the order dismissing the action was a final judgment from which an appeal lies, and therefore *mandamus* is not an available remedy. The order of the court was not a judgment. In the first place, the order was not warranted by the statute under which the court presumed to act. Section 1004, above, provides: "The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register." This order was made in the minutes of the court. The clerk is the custodian of his register, and the only entries to be made therein are entries by the clerk, and not by anyone else. Besides, the order does not bear the characteristics of a judgment. It is nothing more than an order of the court upon which a judgment of dismissal and for costs could have been entered. (*Miller v. Northern Pacific Ry. Co.*, 30 Mont. 289, 76 Pac. 691.) The text-books and encyclopedias which announce the doctrine that the dismissal of an action is a final judgment from which an appeal will lie almost without exception cite authorities from states having special statutes permitting an appeal from an order of the character of the one made in this instance, or from courts holding that a *judgment* of dismissal is a *final* judgment within the meaning of the statutes providing for appeals from final judgments, and with them we agree. One or two isolated cases may be found holding that an order substantially in the form of the one made here is of itself a judgment, but with them we do not agree. Our Code (section 1007, Code of Civil Procedure) emphasizes the fact that the final disposition of an action on a dismissal thereof is accomplished by a judgment.

In *Miller v. Railway Co.*, above, this court held that the dismissal warranted by section 1004, made by the clerk, only ter-

minates the action so far as to prevent further proceedings except the rendition and entry of a judgment. There cannot be two judgments, each finally disposing of the action, and, if the judgment of dismissal and for costs to which defendant is entitled is such final judgment, then it is self-evident that the order of dismissal is not such.

There is nothing in *Dahler v. Steele*, 1 Mont. 206, or in *Holter Lumber Co. v. Insurance Co.*, 18 Mont. 282, 45 Pac. 207, in conflict with the views herein expressed.

But if it be said that the defendant railway company might have had a judgment entered upon the order, and from such judgment might have appealed to this court, it is sufficient to say that such a remedy would be inadequate. The provisions of our Code with reference to *mandamus*, pertinent here, are found in sections 1961 and 1962 of the Code of Civil Procedure. Under section 1961 it is declared that the purpose of the writ is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office." Section 1962 is as follows: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." It will be observed that there is nothing in these provisions which prevents the issuance of the writ even in those cases where an appeal lies. The distinction between section 1962 and the provisions relative to *certiorari* (section 1941 of the same Code) is to be noted.

If the remedy by appeal, or any other method other than *mandamus*, is not plain, speedy, and adequate, *mandamus* will lie, if the case is otherwise a proper one. The only question presented to this court by such an appeal—if, indeed, the defendant railway company could have appealed—would be the action of the court in dismissing the action. It would not present for the determination of this court the question as to whether or not the district court should pass upon the motion for judgment on the pleadings, and certainly on an appeal from a final judgment this court could not coerce the district court into passing upon that motion, which is practically the only purpose to be sought by this proceeding.

Of course, we agree with counsel that, where a court has acted in a given particular, *mandamus* will not lie to correct the error, if error was made. But in this instance the court has not acted, but has particularly refused to act—that is, it has refused to pass upon the motion for judgment on the pleadings, duly argued and submitted, and properly before it. We are of the opinion that the determination of such motion is an act which the law specifically enjoins as a duty resulting from the office, and that the record in this instance presents a case where the remedy by appeal, if available, would be entirely inadequate, and that *mandamus* will lie.

Let the writ issue as prayed for.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

CALEDONIA INSURANCE COMPANY, RESPONDENT, v.
NORTHERN PACIFIC RAILWAY COMPANY, AP-
PELLANT.

(No. 2,033.)

(Submitted December 13, 1904. Decided February 10, 1905.)

*Fire Insurance—Subrogation—Rights of Party Subrogated—
Recovery of Statutory Interest.*

1. The right to recover damages for the negligent destruction of property by fire, together with interest recoverable in the discretion of the jury under Civil Code, section 4281, is assignable under Civil Code, section 1351, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed.

*Appeal from District Court, Custer County; C. H. Loud,
Judge.*

ACTION by the Caledonia Insurance Company against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. William Wallace, Jr., and Mr. Charles Donnelly, for Appellant.

At the common law, interest can never be allowed in an action of tort for unliquidated damages. (*Isaacs v. McAndrew*, 1 Mont. 454; *Randall v. Greenhood*, 3 Mont. 512; *Palmer v. Murray*, 8 Mont. 185, 19 Pac. 553; *Railway Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 151; *Railway Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811; *Kennie v. Railway Co.*, 63 Mo. 99; *Atkinson v. Railway Co.*, 63 Mo. 367; *Meyer v. Railway Co.*, 64 Mo. 542; *De Steiger v. Railway Co.*, 73 Mo. 33.)

When, in an action for the negligent destruction of property it is, by statute, left with the jury to say whether interest on the damages shall be allowed, or withheld, it can only be upon the principle that in some cases negligence is attended with circumstances of aggravation which warrant the recovery of additional damages for it. (See 2 Greenleaf on Evidence, secs. 253-273; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Stewart v. Maddox*, 63 Ind. 51; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366; *Smith v. Holcomb*, 99 Mass. 552; *Austin v. Wilson*, 4 Cush. 273, 50 Am. Dec. 766, and note; *Boyer v. Barr*, 8 Neb. 68, 30 Am. Rep. 814; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Mich. 84; *Durfee v. Newkirk*, 83 Mich. 522, 47 N. W. 351; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485; *Spokane Truck Co. v. Hofer*, 2 Wash. 45, 26 Am. St. Rep. 842, 25 Pac. 1072, 11 L. R. A. 689.)

Mr. Sydney Sanner, and Messrs. Van Ness & Redman, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On June 30, 1900, certain buildings belonging to Sarah J. Harn, and situated in Miles City, were destroyed by fire occasioned, it is alleged, by the negligence of the Northern Pacific Railway Company. The buildings are alleged to have been of the value of \$1,068, and were insured by the respondent com-

pany for \$800. After the fire the insurance company paid the amount of the insurance, and then brought this action to recover such amount, with interest, from the railway company. A trial was had, which resulted in a verdict in favor of the insurance company for \$800, and for \$213.33 interest. From the judgment entered on this verdict, the railway company appealed.

Upon the trial the court, by three different instructions, in effect told the jury that, if they found for the plaintiff, they might also, in their discretion, allow interest on the amount of such recovery from the date of the payment by the insurance company to Mrs. Harn. The only error assigned on this appeal is the giving of these instructions.

It is apparent that the district court proceeded upon the theory that section 4281 of the Civil Code was applicable to the facts of this case. That section reads as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest may be given, in the discretion of the jury."

Counsel for appellant contend that, admitting that Mrs. Harn could have recovered the value of her property, with interest thereon, in the discretion of the jury, the insurance company could not recover anything beyond the amount actually paid by it, and that the interest which might have been allowed to the owner is in the nature of a purely personal right to her, and awarded because of some circumstances of aggravation attending the destruction of her property. But in this we think counsel is in error.

It is conceded by counsel for appellant in their brief that "in an action brought by Mrs. Harn, the owner of the property in question here, to recover damages for the destruction of it, the instructions here complained of would be unexceptionable." Then, if the circumstances of the burning of Mrs. Harn's buildings were such that a jury might with propriety award her interest in addition to the value of the property, it followed that her cause of action was of that particular character contemplated by section 4281 above.

The next inquiry is, Was such cause of action assignable? For subrogation is merely an equitable assignment, or an assignment by operation of law. Section 1351 of the Civil Code provides: "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." It is clear that in this instance Mrs. Harn's cause of action arose out of the violation of a right of property, and such right of action, or thing in action, is declared by this section to be assignable. A distinction is made in the authorities between a right of action growing out of a violation of property rights, which is generally held to be assignable, and a right of action growing out of the violation of some purely personal right, as, for instance, a simple personal tort, as an action for malicious prosecution, for libel, etc., which is generally held to be nonassignable; and it appears that this particular distinction is recognized by our section 1351 above, which only provides for the assignability of the first class.

A general rule respecting the extent of the right acquired by subrogation in an action of this character is given in 27 American and English Encyclopedia of Law, second edition, 260, as follows: "If insured buildings or other property are destroyed through the fault or negligence of some person other than the owner, the insurance company, upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer. This right of subrogation is frequently enforced against railroad companies which have become liable to the owners of property on account of fires caused by their locomotives. And in some jurisdictions the right is confirmed by statute. The rights of the insurer against the wrongdoer can be no greater than those of the insured, and its recovery will be limited to the amount which it has paid on the loss." The same rule, in different language, but embodying the same meaning, is given in 2 Current Law, 1768, as follows: "The general rule is that, when of two or more persons, each liable to a third, one ought to pay rather than the others, and one of the latter does pay the indebtedness, he is thereupon subrogated so as to

stand in the shoes of the creditor, with all his rights and remedies against the principal."

If the insurance company had purchased Mrs. Harn's entire cause of action against the railway company, it would have been placed in her shoes, and entitled to assert whatever claim she might have asserted, and that claim, as we have seen, was one for the value of her property destroyed, and interest thereon, if in their discretion the jury saw fit to allow interest; and we are unaware of any principle of law or reason which will deny to the insurance company its *pro rata* interest in that right, when, as in this instance, it became subrogated to only a portion of the claim, instead of the whole of it. (*Chicago etc. R. Co. v. Glenn*, 175 Ill. 238, 51 N. E. 896.) A case somewhat analogous in principle is that of *Everett v. Central Iowa Ry. Co.*, 73 Iowa, 442, 35 N. W. 609. Under the Iowa Code a railway company is required to pay for stock killed by it within thirty days after notice thereof by the owner of the stock, and, if such payment is not made within thirty days after such notice, double damages may be recovered. In this case it was held that a claim against a railroad company for killing stock is assignable, and, if the claim be not paid within thirty days after notice by the assignee of the claim, he may recover double damages, just as his assignor of the claim might have done. In considering the question the court said: "But it is insisted that the assignee could not acquire more by the assignment than the actual claim assigned, which, at the time of the assignment, was the right to recover actual damages, and no more. * * * Counsel for defendant contend that by the very language of the statute there can be no recovery of the double damages by anyone but the owner of the stock. The language is that 'such owner shall be entitled to recover double the value of the stock killed, or damages thereto.' (Code, sec. 1289.) But the word 'owner' is not used in the statute in a restrictive sense. In the absence of a statute forbidding it, all demands are assignable, and it would be useless verbiage if the statute should, when it defines a right of action, always confer the right of action on the party in interest or his assignee. We

think it is quite clear that the assignment carried with it all the rights of the assignor, as well as those which had already accrued, and those which might arise in the collection of the claim."

The right to interest in this case, as the right to double damages in the stock-killing case, is purely a statutory right. It is an incident which may attach to a certain class of actions, and the one at bar belongs to that class. An assignment of the right of action carries with it the incident.

It would seem, then, that to the extent of \$800, the amount paid by the insurance company to Mrs. Harn, that company is subrogated to her rights, and may rightly claim the sum paid by it, with interest, if the jury in their discretion determined that the circumstances attending the destruction of the property were such as to justify the allowance of interest.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

IN RE BLACK'S ESTATE. BLACK ET AL., APPELLANTS,
v. BLACK, RESPONDENT.

(No. 2,032.)

(Submitted December 16, 1904. Decided February 11, 1905.)

Appeal—Dismissal—Jurisdiction—Administrators—Final Account—Distribution—Satisfaction of Judgment before Appeal.

Judgment—Satisfaction—Appeal.

1. When a judgment has been paid, it ceases to be reviewable on appeal.

Administrators—Distribution—Appeal—Jurisdiction—Dismissal.

2. Where the distributees of a decedent's estate executed receipts for their respective shares under the decree of distribution, which was thereupon satisfied and the administrator discharged, the receipts

32	51
136	420
32	51
38	585
32	51
140	348

recting that they were not intended to cover any money or property referred to in the decree not yet discovered, thus implying that this exception was the only reservation made by the distributees as to the liability of the administrator, and thereafter appeal from such decree, the supreme court will dismiss such appeal for lack of jurisdiction.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

IN THE MATTER of the estate of John H. Black, deceased. From the decree of distribution, Agnes L. and Amadee L. Black appeal. On motion to dismiss. Motion sustained.

Mr. John A. Luce, for Appellants.

Messrs. Hartman & Hartman, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On April 16, 1903, the administrator of the estate of John H. Black, deceased, filed in the district court of Gallatin county for settlement his final account, and at the same time a petition for the distribution of the estate. The account was, after amendment and a hearing of objections thereto by the distributees, settled, and a decree of distribution made and entered in accordance with the prayer of the petition. The decree was entered on September 14th. Thereupon the appellants, son and daughter of the deceased, appealed generally from the decree and from an order denying them a new trial. The appeal from the decree was perfected on November 13th. The order denying a new trial was made on January 11, 1904, and the appeal therefrom was perfected on January 15th. A motion has been submitted, asking that the appeals be dismissed on the ground that before either of them was perfected, and before the motion for new trial was made, the appellants had received from the administrator the distributive shares allotted to them, respectively, by the decree, giving receipts in full therefor, and that the administrator has been finally discharged.

In support of the motion, respondent has submitted a copy of the order of final discharge, and also of the receipts signed and

delivered to him by the appellants upon which the order of discharge was made, all dated September 14, 1903. Affidavits accompanying these copies show that the receipts were actually delivered on the day after the administrator had delivered to the appellants the shares in the estate to which they were declared entitled. The order of discharge was entered immediately thereafter. The affidavits also show that the property belonging to the estate was actually delivered by the administrator to the distributees. The receipts are identical, and their recitals, omitting the title, are as follows: "This is to certify that I have received of A. H. Black, administrator of the estate of John H. Black, deceased, the sum of \$2,245.85, and an undivided half interest in and to all of the real estate and personal property of the estate of John H. Black, deceased, mentioned and described in the decree of distribution duly given, made and entered in said estate by the court on the 14th day of September, A. D. 1903, this receipt being in full of the distributive share of the said estate as allotted to me in and by said decree of distribution herein on said day entered. This receipt is not intended to cover any money or property referred to in said decree as not yet discovered. Dated this 14th day of September, A. D. 1903."

The theory of respondent is that the appellants, having accepted the provisions of the decree and voluntarily satisfied the same, were not at liberty thereafter to move for a new trial, and appeal from the order overruling the motion, or from the decree. Appellants contend that the record shows that they were entitled absolutely to the amount of the shares delivered to them, and that a decision of this court upon the contested items of the account cannot possibly affect respondent's liability to them for these amounts.

The right to accept the fruits of a judgment, and at the same time to prosecute an appeal from it, are not concurrent. On the contrary, they are wholly inconsistent rights. The election of one necessarily excludes the enjoyment of the other. When a judgment has been paid, it has passed beyond review; the satisfaction of it being the end of the proceeding. "Payment pro-

duces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements." (Freeman on Judgments, 466. See, also, *In re Baby's Estate*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; *Estate of Shaver*, 131 Cal. 219, 63 Pac. 340; *Sterne v. Vert et al.*, 111 Ind. 408, 12 N. E. 719; *Cassell et al. v. Fagin*, 11 Mo. 207, 47 Am. Dec. 151; *Moore v. Floyd et al.*, 4 Or. 260; *Laird v. Giffin*, 84 Wis. 286, 54 N. W. 584; *Hamilton County v. Bailey*, 12 Neb. 56, 10 N. W. 539; *Borgalthous v. Insurance Co. et al.*, 36 Iowa, 250; *Jarvis v. Mitchell*, 99 Mass. 530; *Rolette County v. Pierce County*, 8 N. D. 613, 80 N. W. 804; *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37; *Holt et al. v. Rees et al.*, 46 Ill. 181; 2 Cyc. 654.) The only exceptions to this general rule established by the foregoing authorities are where the appeal is taken from some specific part of the judgment, in a case in which several independent issues have been tried, and a review of the action of the court on one or more of them by the appellate court will not disturb the determination already had of those about which no complaint is made, or where the amount found in favor of the appellant is due him in any event, and the only question left to be determined by the appellate court is whether his recovery should have been greater. Such exceptions are recognized by the following cases cited by counsel for appellants: *State v. Central Pac. R. Co.*, 21 Nev. 172, 26 Pac. 225; *Higbie v. Westlake*, 14 N. Y. 281; *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Merriam v. Victory Placer M. Co.*, 37 Or. 321, 56 Pac. 75; *Mellen v. Mellen*, 137 N. Y. 606, 33 N. E. 545.

In each of these cases it will be seen that the party appealing was confessedly entitled to receive what was awarded him by the court below, the only question for determination being whether the amount should not be increased, or else complaint was made of some particular part of the judgment, the review of which did not affect the other issues adjudicated. One other exception to the general rule seems to be recognized in the case

of *In re Day*, 18 Wash. 359, 51 Pac. 474, as where the appeal has been perfected before the payment of the judgment. But this exception is only apparent, for *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867—the case cited by the court in support of its conclusion—falls within one of the exceptions of the cases cited. It will be found upon an examination of this case that the appellant was entitled in any event to the amount received, and that, though the judgment should be reversed or modified as to the part of it from which the appeal was being prosecuted, his right to the amount received would not be affected.

Counsel for appellants contend that, inasmuch as the account of the administrator was made up of many items, some of which were allowed by the court, and others disallowed, it is apparent that the amount allowed was due to the distributees in any event, and that this condition brings these appeals within the second exception made in the cases cited. In this we do not agree with him. The appeals were taken generally, both from the judgment and from the order denying a new trial, and the purpose sought is a reversal of the action of the district court as a whole. Where the appeal is general, and a reversal of the judgment as a whole is sought, so that the trial court may hear the case anew, with the probable result that the amount awarded to the appellants may be greater or less under proof of facts and circumstances which may be entirely different, the result of the appeals should put the parties in *statu quo*. In this case objections were made to many items. Some of them were sustained, and some overruled, and the action of the court as a whole is complained of. If these appeals should be tried upon their merits, and the judgment reversed, upon another trial in the court below the administrator might be sustained in some of his claims upon adducing other proof, and thus the result would be that the parties would not stand relatively in the same position as when the original judgment was entered. Under such circumstances, we feel constrained to hold that the appeals fall under the general rule, and that they must therefore be dismissed.

For another reason, however, we think that this court has no jurisdiction of the appeals. The receipts, read and construed according to their plain import, clearly imply that it was the intention of the distributees at the time they were executed to acknowledge receipt in full of all the distributive shares to which they were entitled in the estate, with the one exception that they would be entitled to a distributive share in any other money or property not yet discovered at the time the decree was entered. The recital in the receipts is, "This receipt is not intended to cover any money or property referred to in said decree not yet discovered"; clearly implying that the exception thus provided for was the one reservation made by the signers of the receipts as to the liability of the administrator. Such being the case, it is clear that on this ground, also, the appeals must be dismissed.

Let the appeals be dismissed.

Dismissed.

MR. JUSTICE MILBURN concurs.

MR. JUSTICE HOLLOWAY, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

32	56
39	388

MILES, APPELLANT, v. BUTTE ELECTRIC AND POWER
COMPANY, RESPONDENT.

(No. 2,030.)

(Submitted December 19, 1904. Decided February 15, 1905.)

Water Rights—Appropriation—Validity—Statutes—Evidence—Sufficiency—Nonsuit.

Water Rights—Appropriation—Statutory Requirements—Evidence.

1. In an action for damages for using the water of a certain river, and for an injunction to prevent interference with the alleged rights of plaintiff therein, evidence examined, and held to warrant a nonsuit for failure of the plaintiff to comply with the requirements of Compiled Statutes, fifth division, sections 1250, 1251, 1256 and 1257, in

making his alleged appropriation, in that he never diverted the water claimed to have been appropriated, or constructed any dam, ditch, flume, or work of any kind to convey water to any place for a beneficial purpose, or owned the land described in his notice, or any mine, mill, smelter, ranch or property to which the water right was appurtenant, and on which the water could be utilized.

Water Rights—Appropriation—User.

2. Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water, or water right, does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water, or for damages for its diversion.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Frank R. Miles against the Butte Electric and Power Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Mr. J. S. Shropshire, and Mr. G. W. Stapleton, for Appellant.

Messrs. Kirk & Clinton, for Respondent.

MR. COMMISSIONER BLAKE prepared the opinion for the court.

This is an appeal from a judgment entered in favor of defendant for costs after the motion for nonsuit was sustained. The defendant is a corporation organized under the laws of the state of New Jersey, and doing business in the state of Montana. The plaintiff filed his complaint August 9, 1902, and prayed for damages in the sum of \$150,000, and also for an injunction restraining the defendant from using certain water, and interfering with the rights of plaintiff to the further enjoyment thereof. The material allegations of the complaint are that plaintiff since the year 1889, by appropriation under the laws of the state of Montana, "has been the owner, in possession, and entitled to the possession, use and enjoyment, of five thousand inches" of the waters of the Big Hole river, in the county of Silver Bow; that plaintiff entered into an agreement with the Big Hole Lumber Company, a corporation organized under the laws of the state of Montana, whereby

said company entered into the possession of the right of plaintiff to said water, and, with the consent of plaintiff, constructed at great expense a dam across said river, and erected "a mill and flume, by means of which plaintiff used the said water for milling and fluming purposes"; that up to the year 1899 "plaintiff had so made and was making a beneficial use of the water"; and that in said year 1899 the defendant erected a dam and other structures below the place of appropriation by plaintiff, and "caused the water of the said river to back up, overflow and flood plaintiff's dam and millsite, and a portion of the said flume, by reason of which the same have become useless, and cannot be used for the purpose for which they were constructed, to the damage of the plaintiff in the sum of \$150,000." The answer denies these allegations, and avers that said Big Hole Lumber Company used and possessed said water of said Big Hole river, and constructed said dam, mill and flume, for its exclusive benefit and without the consent of the plaintiff. The action was tried with a jury, and at the conclusion of the testimony the court granted the motion of the defendant for a nonsuit, and its ruling must be reviewed.

The plaintiff testified that he located the water June 1, 1889, and put up the notice which was received in evidence without objection, to wit:

"Notice is hereby given to all persons concerned, that Frank R. Miles, a citizen of the United States, and a resident of Deer Lodge county, Montana Territory, does hereby claim and intend to appropriate and use the water of the Big Hole river, in Silver Bow county, and territory aforesaid as follows, to wit:

"1st. The number of inches of the waters of the said Big Hole river, claimed by me is five thousand (5,000) inches, to be measured as provided by an Act of the legislative assembly of the territory of Montana, approved March 12, 1885.

"2d. The purpose for which said water is claimed is for driving, milling, smelting, fluming, irrigating, mechanical and all other useful purposes. And the place of intended use is upon section No. 18, township No. 1 south, range 9 west of the principal meridian, Montana Territory.

"3d. The means of diversion of said water will be by a dam, and flume and ditch.

"4th. The date of the appropriation is the date of this notice.

"5th. The name of the appropriator is F. R. Miles.

"6th. The name of the stream from which the appropriation and diversion of said waters is to be made is as above stated the Big Hole river, and is a tributary of the Jefferson river in Madison county, Montana Territory.

"7th. The place of appropriation of said water in said Big Hole river will be upon section No. 18, township No. 1 south, range No. 9 west of the principal meridian, Montana Territory. And the point of diversion of said water will be about three and a half miles up said river from Divide Station on the Utah and Northern Railway in Silver Bow county, and below Dewey's Flat, in Beaverhead county and territory aforesaid, and a notice of this claim in writing is posted in a conspicuous place on a stump on the east bank of said Big Hole river at the point of intended diversion. Witness my hand this 1st day of June, 1889.

"FRANK R. MILES."

This notice was duly verified and filed for record June 3, 1889, in the office of the county recorder of the county of Silver Bow.

The plaintiff further testified: "After locating the water, I went over, within the time specified by law, to run out my ditch or flume. Took a level from my home, and went over there some time in June, after the water was located; and I hired a man to help me carry the rod. * * * I ran out my line of ditch, and it took me nearly two days to survey my ditch or flume where I intended to divert the water; and it was all because of my agreement with Trask that I did not put my flume in at that time. Mr. Trask was the general manager of the Big Hole Lumber Company. * * * As to the manner and by whom the diversion of my water was made: The Big Hole Lumber Company, and Mr. Trask as superintendent

of the company, under his agreement with me, constructed a dam according to my plans on the site I had located. I ran my ditch on the Silver Bow side of the river, * * * and the dam was constructed according to my plans, and the water was diverted; and he took me there afterwards to show me that he had complied with all the conditions of our agreement. As to the agreement I had with Trask: When I was there surveying the ditch, he came down the river from Dewey's Flat, or from his operations below on the river some place, and he asked me if I was going to represent my water right, and I told him that I certainly was. * * * He said there was not water enough there to cover both locations, and he says, 'There is only about timber enough to last four or five years, and we will be through with it, and the water is yours'; and under that agreement I drew the plans, and the dam was built according to these plans, and he carried out his agreement with me. * * * The water was used under this agreement by the Big Hole Lumber Company. They constructed a dam, built a flume, and they moved the mill from the lower dam, and allowed the lower dam to wash out, and paid no attention to it. They used it until I went to the Klondike in 1897. I saw Mr. Trask at that time, and he was acting on there the same as before. I made this arrangement with the Big Hole Lumber Company through Trask, in June, 1889, the same year I located the water. Mr. Trask had succeeded me as superintendent of the Big Hole Lumber Company in April previous. * * * A man by the name of Frank Horton helped me survey the ditch. * * * The flume was between two and two and a half miles long. * * * There was five thousand inches of water diverted and used by the Big Hole Lumber Company under my appropriation and agreement with Trask. * * * I first learned that the Big Hole Lumber Company had quit up there when I returned from the Klondike in 1899. I learned that the Big Hole Lumber Company had sold out, and I made inquiry about my water right. I asked Mr. Trask what had become of my water right, and he said. * * * He told me that W. A. Clark had sold my water right with the balance of the outfit.

I learned that other parties that he had sold to had constructed a dam, and I learned that the firm of Winters, Parsons & Boomer were the contractors that put up this dam; and I went over to Mr. Winter's office for information, and he told me that they had constructed a dam, and where they had constructed it—that it had flooded the old Big Hole Lumber Company dam.

* * * What I mean by saying the old dam had been flooded is that the new dam was so much higher than the old one that it had overflowed it. I have seen the new dam recently.

* * * On the very same location that I located that dam was built, and covers the other dam. * * * I never made any conveyance of my right, to my recollection. The Butte Electric and Power Company, the defendant in this case, is using the water now. * * *

The defendant's use of the water has rendered my point of diversion absolutely useless—destroyed it. The water is so high I couldn't get down to where I made my location. They control it with their dam. They can lower the water. They control it, and I couldn't get to my point of diversion; that is, the crown of the old dam. It is about forty feet under water. * * *

After Trask quit using the water I didn't do anything toward using it, except bring this suit. * * *

Q. What was your intention in location and appropriating this water? * * * A. My intention was that, knowing that a good location was wanted for a smelter site, to hold it for that purpose. * * * I consider that my damages are reasonably worth the amount of \$150,000, taking into consideration the value of that location."

On cross-examination the plaintiff testified: "We chained out and staked the line of the ditch. Didn't make any record of the fact of running this ditch, or put it in writing, any further than to keep an account of the distance chained—just an account of the number of chains. Didn't file any record anywhere of the millsite, or reduce to any writing this survey, nor of the damsite, except what appears of record in the location of the water right. * * * At the time I made this location and filed the notice I was engaged in business at home on the ranch. Had no other business but ranching. It was in the

Deer Lodge Valley. It was about thirty miles from this water location. It would not be forty-five miles from the ranch, because you would not have to come to Butte. In my notice I state that I intend to divert the water on the east side of the river. I did not, nor did the Big Hole Lumber Company, divert the water on the east side. * * * After making the survey and locating the damsite I drew the plans for the dam. I delivered them to Mr. Trask and his foreman, Mr. Sharp. * * * I submitted them to Mr. Trask. I did not draw them at his request. I submitted them to him because that was the style of a dam to go in there—that I wanted them to put in on that location. * * * I found out from Mr. Trask that the Big Hole Lumber Company wanted to build a dam there. * * * It was the first dam constructed on that particular site after I made my location, and the only one that used the water covered by my location. After the dam was completed I did not do anything with reference to the water right, except to go out there on one or two occasions. The first time I went out there was in the fall of 1889. That was the time the dam was in course of construction by the Big Hole Lumber Company. I did nothing except to instruct Mr. Sharp, the foreman, in regard to how the gates should be put in. * * * It was at this time that I stopped, in passing up the river, in Senator Clark's employ, and gave them instructions with reference to the gates. * * * Mr. Trask was the only man I dealt with, so far as the Big Hole Lumber Company is concerned, in making my agreement. I dealt with him as superintendent. That agreement was not in writing. * * * The agreement, as near as I can remember, was when I was making the survey. Mr. Trask came down the river. He had been up looking after the business of the company, and he came down to the bridge, and he says, 'Do you intend to represent your water right?' and I says, 'I do.' 'Well,' he says, 'there is not enough here to cover both locations'; and he says, 'I want this water to build a dam here, and take a flume out, and get my wood in poles.' * * * As to my business since 1889, from June 1st: In 1890, I went to Great Falls to look the

river over to see how it would do to drive lumber, and I cruised the country that summer with a pack train, looking for timber, and I made my report on that in August, 1890; and we then organized what is known as the B. & M. Commercial Company. That was a Boston company; they were operating on the Missouri river and Sheep creek, at Great Falls and in the Flathead country. I went to Great Falls in 1890, but my home was in the Deer Lodge Valley. I went to the Flathead in 1891, or rather late in the fall of 1890. I remember that you went over the reservation with me the first time that I came there, in the fall of 1890. I lived in the Flathead until 1897. Then I went to the Klondike, in July, I believe. I left here in August, 1897, and came back in July, 1899, if I do not mistake. From 1890 to the present time I have only had Mr. Trask in the Big Hole country looking after my interests there, under my agreement with him. I don't remember when he died. I know I saw him there after I came back from the Klondike in 1899. I went back to the Klondike two or three times since, and I think Mr. Trask was out there when I was out there. After 1890, I next visited the Big Hole river in 1895, I think it was. I went over there to look at a spur—to refresh my recollection in regard to some litigation that Jeff Lavell had with the Union Pacific Railroad. They wanted me for a witness. * * * I visited the Big Hole river next when I took these photographs, May 21, 1903. That was a couple of weeks ago—since the commencement of this suit. * * * I owned this water out there. That is the only business I had there, and the only thing I had—the only property rights. Since 1889 to the present time, the only property I ever had in the Big Hole was this water right. I have had no business out there except to be there in 1890, where this dam was constructed. * * * I have ascertained the fact that on or about 1893 it was sold by the sheriff—that is, the assets of the Big Hole Lumber Company—and bid in by W. A. Clark & Bro., but I didn't know it at that time. * * * I learned that he attached the Big Hole Lumber Company. I didn't know that it included this water right. I never looked up the

records to see, because I didn't know what right Mr. Clark had to attach a water right of mine and sell it for an indebtedness of the Big Hole Lumber Company. * * * If the water was diverted on the west side, it would be in Beaverhead county. I have no recollection of ever filing a notice in Beaverhead county. I would recollect it if I had. Under the Trask dam built by the Big Hole Lumber Company, the diversion was made on the Beaverhead side, in Beaverhead county, because of the chances of less damage. I was aware that my location called for a diversion on the Silver Bow county side. So far as your questions are concerned, I think I have told everything I have done in connection with this water right; that is, the work of the actual appropriation of the water."

Frank Horton testified: "I know Mr. Miles. Knew him in June, 1889, when I went to work for him. That was the first that I had ever seen him. We surveyed for him a ditch—I suppose, a water ditch. It was in June, 1889. I was packing the rod. What he told me to do, I done. We worked two days—pretty nearly two days. We commenced in the morning one day, and got through the next day, I think between 3 and 4 o'clock. * * * I heard a conversation between Mr. Miles and Mr. Trask at that time. They were standing on the little bridge, where Mr. Miles and Mr. Trask were talking together. I heard some of their talk. I heard them talking about the water ditch, and about where they were going to take the water out, and where they were going to carry it. * * * In making the survey I carried the rod. I can't say how far we run the line, but I think two and a half or three miles; on the Silver Bow side of the river. It was in June."

The plaintiff was recalled and testified: "The water was taken out on the Beaverhead side of the river, and was run down on that side, and across to the same locality in which I had surveyed my ditch on the Silver Bow side. Run across to the same ground. It crossed the river on the piers and through a flume, and dumped on the same ground that I had made my ditch to—that I made the line of the ditch to. I surveyed the line, but it was not on my ground. I had a filing there once,

but I released it. I never got title to any part of the ground. The ground that I filed on is probably between a half and three-quarters of a mile from the line of the ditch. I believe Mr. Lavell owns the ground there. I released my right in his favor. I released my right about 1891 or 1890. Am not positive. I believe Mr. Partridge owned the ground where the flume was situated. I never had any property on the Big Hole river, since I released my timber-culture claim, except this water right."

The plaintiff rested, and the defendant filed a motion for nonsuit upon the following grounds, to wit: 1. That all of the testimony introduced by the plaintiff fails to show any valid appropriation of any water of the Big Hole river by plaintiff. 2. That all the testimony introduced by the plaintiff fails to show that said water right was appurtenant to any beneficial use, or that the plaintiff ever had or has now any beneficial use for said water, or any part of it, or that the plaintiff has ever diverted or used any portion of the said water of the said Big Hole river, or would be able to now, or at the time of the commencement of this suit, to use any part or portion of the water of the said Big Hole river for any beneficial purpose, and fails to show that the alleged use on the part of the defendant of the water of the Big Hole river in any manner interferes with the use of said water by the plaintiff. 3. Testimony on the part of the plaintiff fails to show that he ever held actual possession of the said water covered by said notice of appropriation introduced in evidence, or that the defendant has in any manner interfered with plaintiff's use thereof. 4. The evidence introduced by plaintiff fails to show any diligence on the part of plaintiff in appropriation or using said waters, and that his claim thereto is inequitable and stale, and constitutes abandonment on the part of plaintiff.

The following sections of the fifth division of the Compiled Statutes of 1887 governed the appropriation of water in the territory at the time the plaintiff filed his notice:

"Sec. 1250. The right to the use of running water flowing

in the rivers, streams, canyons and ravines of this territory, may be acquired by appropriation.

"Sec. 1251. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

"Sec. 1256. Within forty days after posting such notice the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion * * *.

"Sec. 1257. A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this act, the right to the use of the water shall relate back to the date of posting the notice."

The notice may be treated as a compliance with section 1255 of this division, prescribing the statements to be made by the appropriator. The sections *supra* are the embodiment of the decisions of the courts. In *Columbia Min. Co. v. Holter*, 1 Mont. 296, the court said: "An intention to appropriate water, to be effectual as against other parties, must be carried into actual execution with all reasonable diligence, by some known and tangible means, and at some designated point. By appropriation a man acquires only the right of possession and user of water, qualified by the right of others to its use, in such manner as shall not materially diminish or deteriorate it, at the place of his appropriation, in quantity or quality. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same." The supreme court of the United States, in *Basey et al. v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452, affirmed *Gallagher v. Basey*, 1 Mont. 457, and said: "Ever since that decision [*Tartar v. Spring Creek Water & Min. Co.*, 5 Cal. 396] it has been held generally throughout the Pacific states and terri-

stories that the right to water by prior appropriation for any beneficial purpose is entitled to protection." Section 1251, *supra*, was construed by the supreme court of the territory prior to the filing of the notice by plaintiff, in *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571, and the court said: "Now, if they had no land, or legal possession of the land, they had nothing for which they could appropriate the water. So, if Pierce and Durham did not have any possessory rights or interest in these public lands, they could not make any lawful appropriation, and an attempt to do so would be nugatory." The Civil Code, enacted in 1895, retains the sections *supra*. In *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32, the court said: "It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as the settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. * * * The intention of the claimant is therefore a most important factor in determining the validity of an appropriation of water." In *Toohey v. Campbell*, 24 Mont. 13, 60 Pac. 396, the court said: "One of the rules in the system of the law of water rights is that no one man can, by prior appropriation, obtain exclusive control of an entire stream, unless his appropriation is made for some beneficial purpose, presently existing or contemplated. * * * But, as every appropriation must be made for a beneficial or useful purpose (section 1881, Civil Code), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof." (See, also, *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 40 Pac. 398.)

The testimony shows that the plaintiff failed to comply with the law in force in the year 1889 regulating the appropriation

of the right to the use of running water in the rivers of the territory. From June, 1889, until this action was commenced, in 1902, the plaintiff did not divert the water he claims to have appropriated, or construct any dam, ditch, flume, or work of any kind to convey the water to any place for a beneficial purpose. The plaintiff never owned or possessed said section 18 described in the notice, or any mine, mill, smelter, ranch, or property to which said water right was appurtenant, and upon which the water could be utilized. During this long period the plaintiff lived and was engaged in business at remote localities, and, after said notice was filed, made only two visits to the Big Hole river—one for W. A. Clark in the fall of 1889, and the other for Jeff Lavell in 1895. No contract in writing was made with any officer of the Big Hole Lumber Company by which said water right was possessed and enjoyed by the corporation, and under the terms of which the company held for the use and benefit of plaintiff, even if this arrangement could have been made. The plaintiff did not own or possess any share in the business or property of the Big Hole Lumber Company, and did not use or possess, and there was no agreement that he should use or possess, its dam, flume, mill or other property. The assets of the Big Hole Lumber Company were disposed of in 1893 at a sheriff's sale to W. A. Clark & Bro., and plaintiff did not "look up to the records to see," but was told by Trask that said water right was sold with the rest. The plaintiff made no protest, and did not resort to the courts to vindicate his claim from the consequences of this sale. The notice was posted "on a stump on the east bank of said Big Hole river at the point of intended diversion," and the plaintiff made his survey for a ditch therefrom; but the water was diverted on the west bank by said dam, ditch and flume of the Big Hole Lumber Company, in the county of Beaverhead. The plaintiff did not post or file in the office of the county recorder of the county of Beaverhead a notice claiming the right to said water. This reference to the testimony will be concluded by a repetition of the answer of the plaintiff to the question: "What was your intention in location and appropriating this water?" "My intention was that, knowing that a

good location was wanted for a smelter-site, to hold it for that purpose." The court, in *Nevada County & Sacramento Canal Co. v. Kidd et al.*, 37 Cal. 282, states the law applicable to this case. "Until a claimant is himself in position to use the water, the right to the water, or water right, does not exist in such sense that the mere diversion and use of the water by another, is a ground of action either to recover the water, or for damages for the diversion. This is clearly the result of the decision in *Kimball v. Gearhart*, 12 Cal. 29 * * *. Diligence in following up the work, and a presumed pecuniary ability to complete it, are also mentioned as elements necessary to entitle the party to connect his right upon a final actual appropriation with the first act manifesting an intent to appropriate, for the purpose of giving priority over a prior actual appropriation by other parties in good faith, by acts subsequently commenced."

The motion for nonsuit was justly sustained. We recommend that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

Affirmed.

ALLEN, APPELLANT, v. BELL, RESPONDENT.

(No. 2,028.)

(Submitted December 24, 1904. Decided February 17, 1905.)

Master and Servant—Injuries to Servant—Mines—Explosions
—Vice-principal—Safe Place to Work—False Information
—Contributory Negligence.

Nonsuit—Appeal—Presumptions.

1. On appeal from a judgment sustaining defendant's motion for a nonsuit made at the close of plaintiff's evidence, every fact which the evidence tends to prove will be deemed proved.

32	69
134	159
34	100
32	69
138	361
32	69
41	154
32	69
40	9
40	13
40	172

Master and Servant—Mines—Explosions—False Information—Vice-principal—Negligence.

2. Where, in an action for injuries to a miner by the discharge of a blast, it appeared that B. had charge of the operating department of the entire mine for defendant, and was authorized to hire and discharge men, and that he directed them where, when, and how to work, and that his supervision of the mine was supreme, except that defendant directed when new work was to be commenced, and B. falsely stated to plaintiff before he went into the mine that a blast by which plaintiff was injured had been discharged, B. was a vice-principal, and not plaintiff's fellow-servant, for whose negligence defendant was liable.

Mines—Master and Servant—Safe Place to Work—False Information by Vice-principal.

3. The rule that a master is not bound to provide and maintain a safe place for his servants to work, where they are creating the place, and when it is constantly being changed in character by their labor, and becomes dangerous solely by their negligence, did not justify a vice-principal in giving false information to plaintiff, a miner, to the effect that an unexploded blast in the mine, left by a former shift of workmen, had been exploded before plaintiff went into the mine at the time he was injured.

Mines—Master and Servant—Vice-principal—False Information—Negligence.

4. *Held*, that plaintiff, a miner, in an action for personal injuries, was entitled to rely on the information of the person in charge of the operating department of the mine—a vice-principal—that a charge of dynamite in a certain hole had been exploded, when in fact it had not, and was not guilty of negligence in working in the mine on the assumption that the explosion had taken place.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by E. C. Allen against R. A. Bell. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mr. T. J. Walsh, for Respondent.

There is little doubt that in the earlier history of the development of the law of the liability of the master for injuries suffered by the servant in the course of his employment, the respondent would be held answerable for any delinquency on the part of Blair resulting in injuries to any other servant of respondent, merely by reason of his position of superiority and command in and about the operations being carried on. But in the light of the more recent judicial consideration of the subject, it is impossible to so hold. In fact the language used and the conclusions reached by many eminent courts in cases of this character have practically eliminated from the

problem the question of superiority of position and right of command. (*City of Minneapolis v. Lundin*, 58 Fed. 525.)

It was held in the above case that the foreman was not a general or special vice-principal; that if the place was safe when the man was put to work in it, the duty of the city in regard to furnishing him a safe place in which to work was discharged, and that if it became dangerous in the progress of the work, by reason of the negligence of the foreman or any of the workmen, the danger was a risk assumed in his employment—the negligence of a fellow-servant for which no recovery could be had.

The liability of the master is to be determined by the character of the act in respect to which negligence is claimed, rather than by a consideration of the position held by the person charged with negligence. (*What Cheer Coal Co. v. Johnson*, 56 Fed. 810.) If any liability rests upon the respondent in this case, it is only because of the character of the act in respect to which it is claimed he was negligent, and not because of the position Blair occupied. (Note to *Stevens v. Chamberlain*, 51 L. R. A. 534.)

The master's duty is done if the place is safe when the servant goes to work and remains so except as it becomes dangerous during its progress by reason of the negligence of fellow-servants or otherwise. (*Durst v. Carnegie etc. Co.*, 173 Pa. St. 162, 33 Atl. 1102; *Cleveland etc. Co. v. Brown*, 73 Fed. 970, 34 U. S. App. 759, 20 C. C. A. 147; *Baird v. Reilly*, 92 Fed. 884, 63 U. S. App. 157, 35 C. C. A. 78; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74; 2 Labatt on Master and Servant, 588, and notes.)

The negligence complained of is the failure of Blair to tell appellant that the "missed hole" claimed to have existed from the day preceding had not been fired. Was that a duty that is personal to the master, absolute in him, a nondelegable duty, or was it a duty that was delegated and could be delegated to the fellow-servants of the appellant, because arising out of a condition occurring in the progress of the work? The answer may be found in *Mast v. Kern*, 34 Or. 247, 75 Am. St. Rep.

580, and note, 54 Pac. 950. The decision in this case was rendered before *Railway Co. v. Ross* was expressly overruled by the supreme court of the United States, as it was in *New England etc. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, though it had been, in principle, repudiated some time before, as suggested in the opinion.

In the investigation of these questions it is always important to note the date at which decisions cited were decided. The influence of the decision in the *Ross Case* upon judicial action was widespread. The supreme court of the territory of Montana, being bound by the decisions of the supreme court of the United States, followed it in determining the question of responsibility in the case of *Kelly v. Cable Co.*, 7 Mont. 73, 14 Pac. 633, but, guided by the light of the later decisions of the same august tribunal this court abandoned the superior servant doctrine and declared the law to be as announced in *Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, *Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, and *Railway v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, when it came to decide the cases of *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 45 Pac. 210, and *Hastings v. Montana Union Ry. Co.*, 18 Mont. 495, 46 Pac. 264.

The following cases establish that there was no absolute, personal, nondelegable duty upon the respondent to notify the appellant when he went back to work in the shaft, that there was in the bottom of the shaft an undischarged blast or "missed hole": *Johnson v. Portland etc. Co.*, 40 Or. 436, 67 Pac. 1013; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; *Stephens v. Doe*, 73 Cal. 27, 14 Pac. 378; *McLean v. Blue Point*, 51 Cal. 255. In the case of *Alaska Treadwell Co. v. Whelan*, 168 U. S. 68, 18 Sup. Ct. 40, the supreme court of the United States held that the rule of its decisions which was followed and adopted by this court in *Goodwell v. Montana Cent. Ry. Co.* and *Hastings v. Montana Union Ry. Co.* required it to deny the right of recovery under the facts in that case. (*Davis v. Mining Co.*, 117 Fed. 122; *Wiskie v. Montello etc. Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461.)

The duty to notify of "missed holes" is not a nondelegable duty, and not being such, no matter upon whom it fell, whether on Blair or the shift boss or the men engaged in drilling and blasting, it was a part of the duty of the fellow-servants of appellant, for whose default the respondent is not liable. (*Anderson v. Daly Min. Co.*, 15 Utah, 22, 50 Pac. 815.)

Appellant was engaged in a most hazardous calling, and he was called upon for his own protection and those who followed him in the work to exercise the highest degree of care and caution to locate the "missed hole," if there was one. The judgment in this case is right, because the appellant's want of due care was a proximate cause of the injury of which he complains, and although the rule is recognized that contributory negligence is an affirmative defense, this court has repeatedly said there is an exception to or a corollary of the rule—namely, that when the evidence of the plaintiff "raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created." (*Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Hunter v. Montana Cent. Ry. Co.*, 22 Mont. 534, 57 Pac. 140; *Cummings v. Helena etc. R. Co.*, 26 Mont. 451, 68 Pac. 852.)

Mr. C. B. Nolan, and Messrs. Toole & Bach, for Appellant.

Blair, exercising supreme authority, as the evidence discloses, cannot, in the light of the adjudicated cases, be viewed in any other light than that of vice-principal. (*Kelly v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Berg v. Boston & Montana Con. Copper etc. Min. Co.*, 12 Mont. 212, 29 Pac. 545; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 45 Pac. 210; *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334; *Burn v. Hoag*, 37 Cal. 340; *Faulkner v. Mammoth*, 23 Utah, 437, 66 Pac. 799; *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162, 33 Atl. 1102; *Newbury v. Getchell Lumber etc. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N.W. 743; *Zintek v. Stimson Mill Co.*, 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, 9 Wash. 395, 37 Pac. 340; *Consolidated Kansas City Smelting etc. Co. v. Peter-*

son, 8 Kan. App. 316, 55 Pac. 673; *Deep Mining etc. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210. See exhaustive note on this subject, 51 L. R. A. 513-622.)

We respectfully submit, under the authorities cited, whether we gauge Blair by the character of the duties which devolved upon him or by his grade of employment, he is the representative of the respondent rather than the fellow-servant of the appellant.

"Where the negligence of a fellow-servant and a mine owner contribute to the injury, the master is responsible." (*Hancock v. Keene*, 5 Ind. App. 408, 32 N. E. 329; *De Weese v. Meramec Iron Min. Co.*, 128 Mo. 423, 31 S. W. 110; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Handley v. Daily Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Deserant v. Cerrillos Coal Co.*, 178 U. S. 409, 20 Sup. Ct. 967.)

Blair, in the exercise of his supervisory powers, prevented the discharge of the missed hole. In the ordinary course of prosecuting the business, the danger from the missed hole would be removed and the injuries to the plaintiff could not have occurred. It cannot be successfully gainsaid that this interference was not the act of a fellow-servant. It was the exercise of an authority primarily vested in the master. This interference created a lurking danger not possible if the ordinary methods of carrying on operations were observed. It was a danger known to the superintendent and not known to the employee. It was the duty of the superintendent, under those circumstances, to advise the employee of the danger, and his failure to do so fixes the responsibility of the master. (*Harder Coal Co. v. Schmitt*, 104 Fed. 282; *Shannon v. Consolidated Tiger Min. Co.*, 24 Wash. 119, 64 Pac. 169; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Andrews v. Tamarack Min. Co.*, 114 Mich. 375, 72 N. W. 242.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

During the spring and summer of 1901 the defendant was the owner of and was operating the East Pacific mine. One D. E. Blair was in the immediate charge of the mine, and plaintiff was a miner working at the bottom of the shaft when a blast was exploded, causing the injury complained of. At the close of plaintiff's evidence on the trial of the case, the defendant moved for a nonsuit, which motion was sustained. Judgment was entered for defendant, and plaintiff appeals.

In considering the case, every fact which the evidence tends to prove must be admitted proved. (*McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701; *Nord v. Boston & Montana Con. etc. Min. Co.*, 30 Mont. 48, 75 Pac. 681.) The evidence tends to prove that this mine was operated by means of numerous tunnels, drifts, crosscuts, stopes, and shafts. About forty men were employed in different parts of the mine. Blair had charge of the operating department of the entire mine; was authorized to hire and discharge men; directed them where, when, and how to work. They consulted him or the shift boss about material required. Blair's authority was superior to the shift bosses'. No one was over him except the owner, Bell. Bell was at the mine a part of the time, but Blair's authority remained the same during Bell's presence. Bell directed when new work was to be commenced, but Blair had charge of the work when commenced. Aside from this direction by Bell, Blair's authority was supreme. His duty was solely that of direction and supervision as to the working of the entire mine. He gave the men their time, but did not pay them, as that was done by the financial department. He had charge of the teamsters, and told them what ore to ship, but had nothing to do with handling the returns. That was also done by the financial department. The shaft in which the accident occurred was in tunnel No. 4, about two thousand feet from the mouth of the tunnel. The owner of the mine was anxious to have the sinking of this shaft expedited, and for that reason Blair spent more time at the shaft than he did at other places about the mine. This was a double compartment shaft, four and one-half by eight feet in the clear, and at the time of the accident had attained a depth of about one hundred and thirty feet. A ma-

chine drill was used in making the holes, and the rock was blasted by the use of dynamite. Three shifts, of two men each, were employed, each shift working eight hours. On June 30, 1901, the Johnson shift commenced at 7 o'clock in the morning, continued until 3 in the afternoon, and was succeeded by the Allen (plaintiff) shift, which commenced work at 3 o'clock p. m., and continued until 11 o'clock p. m. At the time this Allen shift commenced work, they were informed by the preceding shift and also by Blair that there was a missed hole, when Allen said, "I will go down, clean out, and blast it." Blair then remarked: "It is in the west end of the shaft, and you will be drilling in the east end, and it will not be in your way. Let it go, and I will see that it is blasted when the next round is blasted." The custom prevailing at the mine in case of a missed hole was that the same should be discovered and blasted by the succeeding shift. The Allen shift did not search for the missed hole, and did not blast it, but, in obedience to the orders of Blair, continued their work in the east end of the shaft. At 11 o'clock p. m., when this shift went off duty, it was succeeded by the unknown shift, which was informed of the existence of this missed hole. This unknown shift continued work from 11 o'clock p. m. June 30th, until 7 o'clock a. m., on July 1st, and was again followed by the Johnson shift at that hour. The Johnson shift was not notified of the fact that this missed hole had not been discovered and blasted. This shift was again succeeded by the Allen shift at 3 o'clock in the afternoon of July 1st. The Allen shift at this time received no notice from Johnson that the missed hole had not been blasted, but prior to the time when Allen went down into the shaft, he inquired of Blair how everything was below, and was informed that it was all right, that all the holes had been blasted, and was also instructed by Blair to muck out what dirt and debris remained in the bottom of the shaft. In cleaning out this dirt and debris, the blast was discharged by a blow from a pick in the hands of Allen, resulting in the injury complained of. There had been blasting done in the mine between the time that Allen went off duty at 11 o'clock on the 30th of June and the time when he came on duty on the 1st of July.

But two questions are presented: 1. Was Blair a vice-principal of defendant, or was he, with reference to the matters concerning which it is claimed he was negligent, a fellow-servant of the appellant? 2. Was the appellant himself negligent?

It is familiar law that a servant, in the absence of statute, assumes as one of the incidents of his employment the risks of injury from the negligence of a fellow-servant, because the master cannot by the exercise of the greatest care and caution guard against such negligence. (*Goodwell v. Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210; *Mast v. Kern*, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 950, and cases cited.)

Decisions of courts differ as to the method of determining when one employee is the fellow-servant of another employee. These conflicting decisions have given rise to two distinct rules: 1. The superior servant criterion, based upon the rank or grade of the employee. Under this rule, when the master has given to an employee supervisory control and management of his business, or some particular department thereof, such employee, while so acting, stands in the place of the master as to those things under his direction and supervision, and for his negligence the master is liable; 2. That the character of the act in the performance of which the injury arises, and not the rank or grade of the employee, determines his relationship to other employees, and that, if the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank or grade of the employee to whom it is intrusted, but, if it is one pertaining only to the duty of an operative, the employee performing it is a fellow-servant, whatever his rank, and for his negligence the master is not liable. (*Mast v. Kern*, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 950.)

Both of these rules cannot be applied at the same time, though one may aid in expounding the other. Under the first rule the party in charge cannot say, "I speak now as your master," and again, "I speak now as your fellow-servant," for this shifting would destroy the distinction between the rules, and would destroy the superior servant theory. Under this first rule, if the party in charge stands in the place of the master, he is the master

as to the other employees. The character of the service performed by him is considered for the purpose of determining the grade or rank, but when this is established the superior servant cannot, by engaging in the performance of labor ordinarily performed by those under him, divest himself of this character, and his commands respecting the labor to be performed by the other employees in the department where he stands as the representative of the master have the same effect as though emanating directly from the master. Mere superiority of service, it is true, does not always constitute a superior servant a vice-principal. It has been repeatedly decided that a mere foreman or shift boss is a fellow-servant with those working under his direction and supervision, although the shift boss or foreman has the authority to hire and discharge men. (*Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633, is overruled on this point by *Goodwell v. Montana Cent. Ry. Co.*, above, and *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264.)

Under the second rule, a general manager of a railway system or of a mine, whether title vests in a corporation or in an individual, may, under orders or of his own volition, engage temporarily in some labor ordinarily performed by other employees, and thus become a fellow-servant with such other employees; and the master is not liable for any damage resulting from his negligence while so engaged, although he is not at any time divested of his power and authority as a vice-principal, and the other operatives cannot prevent him from engaging in such labor, nor dictate to him how he shall perform it, nor refuse to obey his commands while he is performing it, for he still retains his authority as vice-principal. On the other hand, the ordinary operative may by orders *only* engage in the performance of duties which should be done by the master, and the master is then liable for his negligence while so engaged.

Decisions respecting the fellow-servant doctrine are collected and classified in *Northern Pac. R. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, and in *Mast v. Kern*, *supra*.

The *Goodwell Case*, *supra*, was decided after the *Ross Case* (*Chicago, M. & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup.

Ct. 184, 28 L. Ed. 787) had been modified by the decision in *B. & O. Ry. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, and the *Hambly Case*, *supra*, and contains this statement: "To these examples where the superior is deemed a principal rather than an agent, may be added the superintendent of a mine, as was decided in *Kelly v. Mining Co.*, 16 Mont. 484, 41 Pac. 273."

Under the facts as disclosed by this evidence, which here stand admitted, there is no doubt that Blair was a vice-principal, whichever rule may be followed.

It is also a rule well established that an employee assumes the ordinary risk of his employment (*McCabe v. Montana Cent. Ry. Co.*, above cited), and that the rule that a master must use reasonable diligence to provide and maintain a safe place to work does not apply to a case where the employees are creating the place of work, and when it is constantly being changed in character by their labor, and becomes dangerous only by the carelessness or negligence of the workmen (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515). But this rule does not justify a master in neglecting to give information known to him, or with the knowledge of which he is charged, regarding concealed danger. Much less does it justify him in giving false information regarding any danger. When Blair ordered Allen to depart from the custom of searching for and blasting missed holes, and directed him to leave the missed hole, and said that he (Blair) would see that it was set off when the next round was blasted, he took upon himself the duty of seeing that this was done, for he knew that Allen relied upon that statement. When Allen came on duty again he inquired about this missed shot, and was informed by Blair that it had been blasted. Blair knew that Allen relied upon this information, and, by reason of relying upon it, as appears from this evidence, he was injured. It is also in evidence that it was the custom that Blair was notified of the existence of missed shots, and that he frequently notified the oncoming shift of their existence. Under these facts, Allen was not negligent in relying upon the information given him by Blair, nor did he violate any duty or sub-

ject himself to the charge of carelessness by obeying the orders of his superior.

We think the evidence sufficient to make it the duty of the court to submit the case to the jury. Consequently we recommend that the judgment be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

Reversed and remanded.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

Rehearing denied April 4, 1905.

THORNTON-THOMAS MERCANTILE COMPANY, RE-
SPONDENT, v. BRETHERTON ET AL., APPELLANTS.

(No. 2,029.)

(Submitted December 15, 1904. Decided February 23, 1905.)

*Receivers—Wrongful Receivership—Actions for Damages—
Executors—Survival of Action—Measure of Damages—Evi-
dence—Loss of Accounts—Presumptions—Instructions—
Appeal—Harmless Error—Reviewable Objections—Ac-
tions—Survivorship.*

Wrongful Procurement of Receiver—Executors—Survival of Action.

1. Under Code of Civil Procedure, section 2733, a cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of the decedent wrongdoer.

Evidence—Objections—Supreme Court—Appeal.

2. An objection to the admission of evidence raised for the first time in the supreme court will not be considered.

Receivers—Wrongful Appointment—Evidence—Supreme Court Opinion.

3. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of the supreme court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by the defendants.

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32 80
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Documentary Evidence—Admissibility.

4. An objection to a series of documents as a whole is not well taken if some of them are admissible.

Evidence—Admissibility—Pleadings—Harmless Error.

5. The admission of evidence in proof of matters admitted by the pleadings is not reversible error.

Evidence—Corporations—Books—Appeal.

6. Where the books and papers of a corporation were admitted in evidence without objection, it cannot be claimed on appeal that the admission of one of such papers constituted error.

Offer of Proof—Rejection—Appeal.

7. The rejection of an offer of proof will not be reviewed on appeal where the party making the offer did not state and have placed on the record what he intended to prove.

Receivers—Wrongful Appointment—Evidence—Damages—Accounts.

8. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, plaintiff may show as an item of damage the amount of a good and collectible account which was lost by reason of the receivership.

Receivers—Wrongful Appointment—Evidence—Damages—Accounts.

9. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, evidence of the loss of an account through the receivership and the statute of limitations, is admissible, although no trial of the question in the courts had been had.

Receivers—Wrongful Appointment—Liability for Damages.

10. Persons who wrongfully procure the appointment of a receiver for a going and solvent corporation become, after the appointment is judicially declared void, trespassers *ab initio*, and liable for the damages caused by their wrongful acts.

Receivers—Wrongful Appointment—Damages—Pleadings.

11. In an action for damages caused by the wrongful appointment of a receiver for a going and solvent corporation, where plaintiff did not claim either interest, prospective profits, or exemplary damages, allegations of the complaint concerning the extent of the business of the company, and the conduct of defendants tending to show fraud, oppression, or malice, must be treated as surplusage.

Receivers—Wrongful Appointment—Measure of Damages—Presumptions.

12. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.

Receivers—Wrongful Appointment—Malice—Probable Cause—Evidence.

13. It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, to show that the appointment was procured maliciously, and without probable cause.

Conversion—Measure of Damages—Election.

14. Under Civil Code, section 4333, providing for two measures of damages for the wrongful conversion of personal property, the party

injured must elect under which of these two options he will claim, and he may not be permitted to rely upon both in the same case.

Conversion—Measure of Damages—Election—Instructions.

15. Where a party in his complaint and by his evidence seeks to recover damages for the wrongful conversion of personal property under one of two measures granted by the statute, an instruction authorizing the assessment of damages according to the other standard is erroneous.

Instructions—Pleadings—Evidence.

16. Instructions must be warranted by the pleadings and evidence.

Conversion—Conflicting Instructions—Measure of Damages—Harmless Error.

17. The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided for under Civil Code, section 4333, only one of which options could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict.

Presumptions—Accounts.

18. Under Code of Civil Procedure, section 3266, subsection 32, providing that it is presumed that a thing once proved to exist continues to exist as long as is usual with things of that nature, accounts which are shown to have once been good and collectible are presumed to so continue.

Receivers—Wrongful Appointment—Measure of Damages—Attachment.

19. The fact that accounts and bills belonging to a corporation, which were not collected owing to the wrongful institution of receivership proceedings by defendants, were taken possession of by an attachment to satisfy an indebtedness of the corporation, does not affect the measure of the corporation's damages for the wrongful receivership.

Instructions—Names of Attorneys Subscribed—Harmless Error.

20. The giving of instructions bearing the names of the attorneys of the parties, while not a commendable practice, is not reversible error.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by the Thornton-Thomas Mercantile Company against George P. Bretherton and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Mr. E. B. Howell and Mr. E. De Steiguer, for Appellants.

The action did not survive against the estate. The various provisions of the code upon this question must be construed together, and, if possible, in such manner as to give to each some effect, and its due effect. If the construction contended for by plaintiff is correct, then sections 2731 and 2733, Code

of Civil Procedure, have no force and effect whatever. If the legislature had already provided by section 587 of the same Code that all causes of action survive, and may be maintained for and against the representatives of deceased persons, then the legislature would have done a useless thing to enact sections 2731 and 2733, providing that certain specified classes of actions could be so maintained for or against executors and administrators. If it had been the intent of the legislature to enact such a sweeping provision that all actions of whatsoever nature could be had against representatives of deceased persons—a provision more sweeping, we contend, than is contained in the laws of any other state—then the legislature would certainly have included such amendment in that part of the code where it was peculiarly applicable, to wit, that part relating to the estates of deceased persons, and would have accomplished the purpose designed by including the provisions in sections 2731 and 2733.

This construction of the three sections in question is amply sustained by the decisions of the courts upon similar provisions of statutes of other states. (*Martin v. Baltimore & Ohio R. R.*, 151 U. S. 673, 691-703, 14 Sup. Ct. 533; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Am. St. Rep. 948, 31 Pac. 329, 331; *Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593.) This action must be regarded as an action for malicious prosecution, though special damage in the way of injury to plaintiff's property is alleged. (*Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Sharp v. Miller*, 54 Cal. 329; *Stricker v. Pennsylvania Ry. Co.*, 60 N. J. L. 230, 37 Atl. 776.) Under statutes such as that of Montana, an action for malicious prosecution does not survive. (*Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Conly v. Conly*, 121 Mass. 550; *Cummings v. Bird*, 115 Mass. 346.)

It may be contended that the wrongful acts alleged in the complaint resulted in loss to the property or estate of the plaintiff, and that therefore the cause of action thereby resulting survived. As pointed out in *Noonan v. Orton*, *supra*, at page 263, it is not sufficient that the effect of the wrong complained of diminished the estate of the plaintiff, for such result may follow any personal injury; but the test is, what was the nature

of the wrong committed? In this case the wrongful act complained of was the illegal appointment of a receiver. What was done thereafter was not done by the plaintiffs, but by the receiver. By the statute of 4 Edward III, enacted about the year 1330, executors were given a remedy for trespass to the personal estate of their testators, which remedy was extended by construction to administrators. (*Noonan v. Orton, supra*, p. 265.) Disregarding that part of the Montana statute which refers to trespass upon real estate (which is not applicable to this action), the words of the English statute, "a trespass to the personal estate," are as comprehensive as the language of section 2733, providing that an action may be maintained against the representative of one who "has wasted, destroyed, taken or carried away, or converted to his own use the goods or chattels" of a deceased person. It certainly cannot be contended that under the English statute referred to causes of action arising from personal wrongs survived, even though they may have resulted in damage to the estate.

That the opinion of an appellate court cannot be used as evidence has been held in a number of cases and for a number of reasons. (*Appeal of Buckingham*, 60 Conn. 143, 22 Atl. 511; *Robinson v. New York etc. Ry. Co.*, 64 Hun, 41, 18 N. Y. Supp. 728; *Gage v. Bussey*, 7 Ill. App. 435.)

Instruction No. 13 is erroneous because it leaves to the jury to find damages both speculative and remote. (*Bradley v. Fuller*, 118 Mass. 239; *Savings Bank v. Asbury*, 117 Cal. 96, 48 Pac. 1081.)

It is inconsistent in itself in that it instructs the jury that accounts once shown to be good and collectible are presumed to continue so, but permits them to infer that the same became bad and uncollectible by reason of the appointment of a receiver.

It is erroneous in that it applies the presumption of continuance to a matter to which that assumption is not applicable. The fact alone that an account or a note is long overdue is evidence which the jury is entitled to consider as tending to show that it is no longer collectible.

Whatever money had been realized by the sheriff and remained in his hands either to be applied upon the judgments against the company, or to be returned to the company in case such judgments were fully satisfied, was held by him as much for the benefit of the company as if it had been actually credited upon the judgment and the amount so held by the sheriff should therefore have been deducted from the value of the goods. (*Kaley v. Shed*, 10 Met. 317, 319; *Ball v. Liney*, 48 N. Y. 6, 14, 8 Am. Rep. 511; *Roberts v. Stuyvesant S. D. Co.*, 123 N. Y. 57, 67, 20 Am. St. Rep. 718, 25 N. E. 294; 26 Am. & Eng. Ency. of Law, 1st ed., 855; *Pierce v. Benjamin*, 14 Pick. 356, 361, 25 Am. Dec. 396.)

Mr. John J. McHatton and Mr. George F. Shelton, for Respondent.

The appellants are confined to the objections urged in the court below. A party cannot abandon the ground of his objection taken to the evidence on the trial below and assume another and different ground on the trial of an appeal in the supreme court. (*Fisk v. Cuthbert*, 2 Mont. 599; *Clark v. Huber*, 25 Cal. 593; *Stoddard v. Treadwell*, 29 Cal. 282; *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; *People v. McCauley*, 45 Cal. 146; *People v. Manning*, 48 Cal. 338; *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Bennett v. Green*, 74 Cal. 425, 16 Pac. 231; *Cochran v. O'Keefe*, 34 Cal. 558; *Crocker v. Carpenter*, 98 Cal. 432, 33 Pac. 271; *Lee v. Murphy*, 119 Cal. 367, 51 Pac. 549, 955; *Martin v. Travers*, 12 Cal. 243.)

The opinion of the supreme court constituted in effect a finding of facts upon the record and the conclusion of law applicable thereto, and that, with the certified copy of the order of court annulling the proceedings in the court below relating to the appointment of a receiver, constituted the judgment of the court. If a judicial record is admissible in evidence for any purpose, all of its parts are admissible, though some are immaterial or incompetent. (*Swope v. Paul*, 4 Ind. App. 463, 31 N. E. 42; *Cretin v. Levy*, 37 La. Ann. 182; *Granger v. Warrington*, 8 Ill. 299.)

The objection to the whole of a document offered in evidence, where a part thereof is properly admissible, upon the ground that the entire document is incompetent, irrelevant and immaterial, is not well taken if some of the papers included are admissible. (*Cobeney v. Hale*, 49 Cal. 552; *Board of Education v. Keenan*, 55 Cal. 645-648; *Shatto v. Crocker*, 87 Cal. 631, 25 Pac. 921; *Harris v. Zanone*, 93 Cal. 71, 28 Pac. 845; *Woolbridge v. Boardman*, 115 Cal. 74, 46 Pac. 868.)

Reversible error cannot be predicated upon the admission of evidence of testimony to prove a fact admitted in the pleadings. (*Wells v. McPike*, 21 Cal. 215; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *School District v. McComb*, 18 Colo. 240; *Pfantz v. Culver*, 13 Iowa, 312; *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575; *Fitzgerald v. School District*, 5 Wash. 112, 31 Pac. 427.)

Accounts which appear upon the books are presumed to be good accounts until the contrary is shown. (*Abbott's Trial Brief on the Facts*, 616; *Thompson v. Hall*, 45 Barb. 214; *Hard v. Brown*, 18 Vt. 87.)

The true test in determining whether an action survives or not is whether the injury on which the cause of action is based affects property rights, or affects the person only. In the former case, the cause of action survives; in the latter, it abates. *Assumpsit* will lie against executors on evidence that the testator in his lifetime cut and carried away timbers from the premises of plaintiff without his permission. (*Cooper v. Crane*, 9 N. J. L. 173.) In Dakota a cause of action for taking property of the plaintiff by the sheriff was held to survive. (*O'Neill v. Murray*, 6 Dak. 107, 50 N. W. 619.) In South Carolina the rule is laid down that when the injury is to the estate, the action survives. (*Nettles v. Doyley*, 2 Bro. 27.) A cause of action for damages to real or personal property survives the death of the trespasser, and may be prosecuted against his executor or administrator. (*Cotter v. Plumber*, 72 Wis. 476, 40 N. W. 379.)

In 21 Encyclopedia of Pleading and Practice, the rule is laid down where, by statute, an action survives against the personal representative of the defendant, it must be considered as sur-

living in favor of the personal representative of the plaintiff. Even though there is no express provision to that effect, the right of survivorship is mutual.

Under this principle, therefore, the provision of the Code (Code of Civil Procedure, section 587), that an action or cause of action or defense shall not abate by the death of a party, being mutual, the cause of action would survive necessarily against the personal representative of a deceased wrongdoer. The same principle as to survivorship as to a cause of action for injury to property is upheld in *Teneyck v. Renk*, 31 N. J. L. 425; *Pierson v. Morgan*, 52 Hun, 611, 4 N. Y. Supp. 898; *Bond v. Smith*, 4 Hun, 48; *Ferrell v. Money*, 33 Tex. 219; *Clark v. Kinan*, 28 N. C. 308; *Weare v. Burge*, 32 N. C. 169 (10 Ire.); *Davis v. Railroad Co.*, 25 Fed. 786; *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 20 Mich. 201.

The principle maintained is that where the action injures the estate of the plaintiff, or a benefit accrues to the estate of the wrongdoer, the action survives.

MR. COMMISSIONER BLAKE prepared the opinion for the court:

This action was commenced to recover damages in the sum of \$22,050 for the wrongful acts of defendant Bretherton and one John D. Thomas in his lifetime in procuring in a certain suit in the district court of the county of Silver Bow the appointment of a receiver of the business and property of the Thornton-Thomas Mercantile Company (hereafter referred to as the "company"), and causing the loss of its accounts and merchandise.

The plaintiff was organized as a corporation in 1890 under the laws of this state for the purpose of carrying on a general mercantile and grocery business in Butte, and was engaged therein until the receiver assumed possession of its business and property. On or about October 6, 1897, said John D. Thomas and Bretherton commenced an action in said district court against the company, and asked for the appointment of a receiver to take possession of its business and property, and

obtained an order from said court appointing E. H. Hubbard. This order was dated October 6, 1897, and authorized and directed said Hubbard, as receiver, to enter into the possession and take and hold all the property, real, personal and mixed, of the company, and take and receive all rents, issues and profits thereof, with the right to sue and recover all sums, property, or interests due said company. The order was served October 7, 1897, upon J. A. Fraser, the president of the company, and said Hubbard as receiver immediately entered upon the discharge of his duties. The company applied to this court for a writ of *certiorari*, and such proceedings were had that it was adjudged that said order appointing said receiver was void, that said district court had no jurisdiction or authority to make such appointment, and all orders of said court made subsequent thereto were vacated. (20 Mont. 284, 50 Pac. 852.) The company did not resume business, and never regained possession of its property, stock of goods, accounts, and bills receivable. John D. Thomas died in 1898, and left a last will and testament naming defendant Mattie A. Thomas as executrix. In June, 1898, the will was duly admitted to probate by said district court, and letters testamentary were issued to said Mattie A. Thomas, who qualified as required by law, and ever since has been acting as said executrix.

The issues presented in the pleadings appear in the following summary: The complaint alleges that at the time said receiver was appointed the company was carrying on a large business with profit, and was solvent; that the value of its stock of goods and property used in its business was \$7,800; that its accounts and bills receivable amounted to the sum of \$15,000; that the costs and expenses incurred in and about said writ of *certiorari* to protect its rights were \$1,050, and that all its profits, assets, and credits were lost except the sum of \$1,500. The answer denies that the company, at the times mentioned in the complaint, was solvent, or carrying on a large business with profit, but avers that at the time of the appointment of said receiver said company was insolvent, and conducting its business at a loss; denies that said stock was of any greater value than \$3,213.39; denies that its accounts and bills

receivable were good to any greater amount than \$1,000, and says that the balance thereof could not be collected; and denies that said company was compelled to expend any sum in procuring the annulment of said order appointing said receiver. The answer further says that the president and manager, John A. Fraser, collected the accounts after the receiver was appointed, and that the company at this time was indebted to W. A. Clark & Brother and others in the sum of \$9,056.13, and was unable to pay more than one-half thereof. There are allegations in the complaint to the effect that John D. Thomas and Bretherton maliciously and without sufficient cause commenced said action and procured said order to be made for the appointment of a receiver, and directed said Hubbard to commit the acts whereby said business of the company was destroyed, and its property, goods, accounts and bills receivable were lost. The answer denies these allegations, or that said company was injured through the acts of John D. Thomas, or Bretherton, or the receiver. It does not appear that the receiver made any report of his acts during his possession of the property and business of the plaintiff. There was a trial by the court with a jury, and a verdict was returned for plaintiff for the sum of \$10,000, and judgment was entered thereon. The defendants gave notice of their intention to move for a new trial upon the following ground: "Errors in law occurring at the trial and excepted to by the defendants." The defendants appealed from the judgment and order overruling their motion for a new trial.

It is the contention of appellants that the right of action, so far as it relates to Mattie A. Thomas as executrix, abated with the death of John D. Thomas, and that the maxim of the common law, "A personal right of action dies with the person," has not been modified by the statute. Section 2733 of the Code of Civil Procedure is as follows: "Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such

person." The courts have not been uniform in the interpretation of laws of this nature, but we have arrived at a satisfactory conclusion. The section *supra* was enacted in 1895, and is the same as section 1584 of the Code of Civil Procedure of California.

The case of *Coleman v. Woodworth*, 28 Cal. 568, was decided in 1865, and the statement of facts is as follows: "Charles Doane was sheriff of the city and county of San Francisco, and as such, an execution on a judgment in favor of N. C. Lane and against Harvey Dickinson was placed in his hands. By virtue of the execution, Doane seized personal property claimed by plaintiffs, and they brought an action against him for the wrongful taking and conversion of the same. Pending the action Doane died, and plaintiff's attorneys suggested his death, and moved that his administrators be substituted as defendants in the action. The court granted the motion, defendants' counsel excepting." Chief Justice Sanderson, for the court, said: "The first point made by counsel for appellants, to the effect that the cause of action set forth in the complaint does not survive against the personal representative of the defendant's intestate, is answered by the one hundred and ninety-seventh section of the Act to regulate the settlement of the estates of deceased persons, which provides that." The statute quoted in the opinion is identical with the section *supra*. The court approves *Coleman v. Woodworth*, *supra*, in *Fox v. Hale & N. S. M. Co.*, 108 Cal. 483, 41 Pac. 330, and says: "The right of the plaintiff to 'maintain' the action against the executors of Hobart is fully authorized by section 1584 of the Code of Civil Procedure." The supreme court of Utah followed these authorities, and said, "It has been held likewise in California under a statute like ours." (*Warren v. Robinson*, 21 Utah, 445, 61 Pac. 30.) We accept this construction of our statute which has so long prevailed in California, and affirm the ruling of the court below that this action can be maintained against Mattie A. Thomas as the executrix of John D. Thomas.

On the trial the plaintiff (respondent) offered in evidence without objection the following papers in the files of the case of John D. Thomas and Bretherton against the company,

wherein the receiver was appointed, to wit, the complaint, amended complaint, second amended complaint, order appointing the receiver, return of the sheriff showing service of the order, petition of the receiver for order of sale of the property of the company, the order of sale upon the petition, summons, the order to the receiver to stay proceedings upon the order of sale, the return of the sheriff showing service of the order appointing the receiver upon J. A. Fraser as president of the company, and the revocation of the appointment of the receiver, and also the *remittitur* of the supreme court in the proceedings for a writ of *certiorari*. Counsel for plaintiff offered in evidence "a certified copy of the supreme court records, under the hand of the clerk of the supreme court and under the seal of the court, in cause No. 1,167, in the case of the *State of Montana ex rel. The * * * Company and John A. Fraser v. The District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, and William Clancy, Judge thereof, Respondents*." The records consist of the writ of *certiorari*, return to the writ, and opinion of the supreme court. When this offer was made counsel for defendants said: "We object to this. The only allegation in the complaint in regard to this is that the supreme court declared the order appointing a receiver void. We admit that, and I do not see how this is pertinent. We therefore object to it as being incompetent, irrelevant and immaterial." Thereupon the court said: "Let the record show that upon the statement of counsel for defendants that their contention is that the plaintiff is not entitled to recover in this action without showing malice or want of probable cause in the bringing of the action in which the receiver was appointed, for that reason the court will admit the evidence offered."

It is contended that the court erred in overruling this objection and in allowing the opinion of the supreme court to be admitted in evidence, on the ground that the same forms no part of the records, and cannot be evidence to prove any fact, and on the further ground that the counsel in the receivership case and the judge appointing the receiver are censured therein in severe terms, and that such comments of the highest tribunal

in the state must be prejudicial to appellants. The opinion is not specified in the above objection, and there has been a complete change of front in the position of appellants. The introduction of this evidence in the court below was resisted upon the ground that defendants admitted the allegation of the complaint that the supreme court declared void the order appointing the receiver, and that this record was not pertinent, and therefore was incompetent, irrelevant and immaterial.

The official character of these records is established by the statute and rule of this court: "A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll." (Section 1950, Code of Civil Procedure.) "A copy of the opinion will accompany the *re-mittitur* when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order determining the proceedings in the trial court." (Rule 19, Supreme Court, 57 Pac. viii.) This court has held repeatedly that a party complaining of error must stand or fall upon the ground relied on in the trial court. (*Fisk v. Cuthbert*, 2 Mont. 593; *Rutherford v. Talent*, 6 Mont. 132, 9 Pac. 821; *Brand v. Servoss*, 11 Mont. 86, 27 Pac. 407; *State v. Black*, 15 Mont. 143, 38 Pac. 674, and cases cited.) The court below did not have its attention called to the objections which are urged for the first time in this court. The appellants deem the reason of the court for the admission of this evidence "wholly insufficient." This was substantially that defendants contend that plaintiff was not entitled to recover without showing malice or want of probable cause in bringing the action for the appointment of the receiver, and the appellants adhere to the theory in this court. At this point in the trial no oral testimony had been offered, and the evidence comprising the above-named records was introductory. It is apparent that both parties were then of the opinion that the plaintiff must prove malice or want of probable cause in the commencement of the receivership case, and the ruling was correct.

Irrespective of this view, the exception should be further examined. We have enumerated the papers which were received

in evidence without objection, and the writ of *certiorari* was an essential part of the records, and constituted with said return and opinion "Plaintiffs' Exhibit 11." The objection to a series of documents as a whole is not well taken if some of them are admissible. (*Board of Education v. Keenan*, 55 Cal. 642; *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921. See, also, *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756; *Yoder v. Reynolds*, 28 Mont. 183, 72 Pac. 417; *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69.) The judgment will not be reversed if the court permits testimony to be offered on matters that are admitted in the pleadings. (*Wells v. McPike*, 21 Cal. 216; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.) No instruction was requested by defendants defining the effect of this opinion as evidence. Our conclusion is that the court did not err in allowing said records to be admitted.

Three exceptions were saved to the ruling of the court regarding a so-called "blacklist" embracing accounts of customers due to plaintiff, in arrears, but not necessarily bad. The bookkeeper of the company prepared reports of such accounts for the Grocers' Protective Association. The questions involved in these rulings are settled by the following paragraph of the bill of exceptions: "Said original blacklist, so called, was then and there present in court among the books and papers identified by witness Fraser as the books and papers of the company, and was offered and admitted in evidence by the court without objection at the same time that said other books and papers were offered and admitted, and said original blacklist, of which exhibit 'H' purported to be a partial copy, was then and there before the court and jury."

Witness Lutey testified that he was talking to Fraser about the grocery business, and an objection was sustained to what Fraser had said as incompetent and not binding upon the plaintiff. The transcript does not throw any light upon this exception. The appellants did not make any offer of proof of the conversation between Fraser and the witness, or that anything was said while Fraser was acting as the agent of the company, within the scope of his authority.

In *Randall v. Greenhood*, 3 Mont. 506, the court said: "The purpose of the inquiry is not disclosed in the record. We have no means of knowing what the appellants proposed to prove by making the inquiry. The answer to the question might have been competent, or it might not. The appellants ought to have stated and placed in the record what they proposed to prove."

D. P. O'Connor, an expert bookkeeper, testified: "I find upon the books of the * * * company the account of Mrs. L. A. Thornton." The following question was then put to the witness: "You may state what the amount of that account was." The defendants interposed an objection that this was "incompetent, irrelevant and immaterial." After an explanation had been made to the court of the object of the testimony, counsel for defendants said: "Objected to further for the reason that the element of damages which he is attempting to prove is not a proper element of damages to be considered by the jury, and is too remote, and the evidence is speculative, and is incompetent, irrelevant and immaterial." Counsel for plaintiff then said: "We will show that this lady (Mrs. Thornton) was perfectly solvent, and that the amount of this account, \$3,069, was collectible, and was perfectly good, and that by reason of the appointment of this receiver the account was lost." The court then ruled: "If the conditions are as you say, that it was collectible, you may show that." The witness answered: "Yes, I have such an account. The account is \$3,069.65, Mrs. L. A. Thornton." There is no dispute about the amount of this indebtedness, and under the offer of proof the objections to the testimony were without merit.

James W. Forbis testified in chief that said account of Mrs. Thornton was good and collectible in October, 1897. On cross-examination the witness testified, "I have acted as the attorney for Mrs. Thornton. Question by defendants: Have you not made an arrangement, either with the officers or the attorneys of W. A. Clark & Brother, that, if the account of Mrs. Thornton can be proved, so that it is shown that that amount is owing by her, that she would still pay the judgment, and not claim the statute of limitations? Answer: There is absolutely

no such an agreement; never was. On the contrary, W. A. Clark & Brother have been trying to collect said bill and was [sic] beaten on the claim of the statute of limitations. Question by defendants: Has there ever been a trial on that? Answer: No, sir. Counsel for defendants: I move to strike out the testimony of the witness on this point as incompetent, irrelevant and immaterial. The Court: It was brought out on cross-examination. I will overrule the objection." It is apparent that appellants sought to prove that an arrangement had been made under which Mrs. Thornton would "not claim the statute of limitation." The witness, however, testified that Mrs. Thornton beat W. A. Clark & Brother "by the claim of the statute." The bare fact that there had not been a trial in the courts did not affect the right of the debtor to avail herself of the protection of this statute by "bluff," according to counsel for appellants, or any other mode, and the motion to strike out the testimony on this point was justly refused.

In *Lockhart v. Gee*, 3 Tenn. Ch. 332, the complainant had a receiver appointed to take charge of all of certain property and collect the rents, but the supreme court of Tennessee decided that the appointment was illegal. The chancellor said: "Having no right to a receiver, the complainant is, of course, liable to the defendants for all the consequences of having had one appointed."

In *Terrell v. Ingersoll*, 10 Lea, 77, the complainant obtained an injunction to restrain the defendants from receiving moneys on notes and accounts belonging to the partnership, and asked for the appointment of a receiver to take possession of and collect the assets. The chancellor granted the prayer and appointed a receiver, and afterward dissolved the injunction, and ordered a reference to a master to hear proof and ascertain what damages, if any, had been sustained by the defendants by reason of the wrongful suing out of the injunction. Judge Cooper, for the court, said: "The plaintiff in an action who wrongfully sues out a writ of injunction is liable for all the injury which proximately results from it, and must be held to active diligence in the conduct of all proceedings under it. It is his duty to see that a receiver is appointed to take charge of

property and effects impounded by the writ, and to secure them by proper legal proceedings which his adversary is prevented by the writ from instituting. *Prima facie*, the complainant is liable for all losses occasioned by the neglect of the receiver to perform his duty, whether it be in realizing the asset, or in accounting for it after it is realized." This case was affirmed in *Downs v. Allen*, 10 Lea, 652.

In *O'Mahoney v. Belmont*, 62 N. Y. 133, the court said: "The appointment of the receiver in this action, and the subsequent proceedings had in regard to the same, was an invasion of the rights of the parties, calculated to waste and deplete the alleged fund, and not demanded by the nature of the action or the circumstances of the case. * * * It is sufficiently apparent that the entry of the order under the circumstances, by the attorney employed by and with the concurrence of the receiver, was an abuse of the proceedings, which cannot be disregarded, and for which he should be held responsible. It constituted him an intruder, and a trespasser upon the rights of the parties."

In *Day v. Bach*, 87 N. Y. 56, the court said: "The authorities seem to establish these propositions: 1. That a void writ or process furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be set aside before bringing the action. (*Brooks v. Hodgkinson*, 4 Hurl. & N. 712.) * * * Where, however, property has been taken, the party against whom the writ issued is entitled to restitution from the party who sued out the writ, of any property or money of the defendant in his hands."

In *Dynes v. Hoover*, 20 How. (U. S.) 65, 15 L. Ed. 838, the court said: "Such is the law in either case, in respect to the court, which acts without having jurisdiction over the subject matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case *coram non judice*. * * * In both cases the law is, that an officer executing the process of a court which has acted without jurisdiction over the subject matter becomes a

trespasser, it being better for the peace of society, and its interests of every kind that the responsibility of determining whether the court has or has not jurisdiction should be upon the officer, than that a void writ should be executed."

Mr. Sutherland, in his work on Damages (third edition), says: "If a defendant is a trespasser from the beginning his defense wholly fails, and he is liable for the same sum in damages which he would be compelled to pay if he had gone on without any precept or pretense of authority and done all the acts proved upon him. * * * The facts and circumstances attending the trespass, as has already been stated, may always be proved, that the jury may understand its intrinsic character; to enable the plaintiffs to show aggravations and bad motive, and to enable the defendant to controvert these; but the defendant, if guilty of the trespass, is bound to make reparation for the actual injury. Absence of bad motive and of all aggravations cannot relieve him from making full compensation for property taken, destroyed, or injured. An admission of counsel on the trial of an action of trespass that the defendant acted without malice will preclude the plaintiff from claiming vindictive damages; and therefore evidence on the part of the defendant in the nature of justification of his tortious act is inadmissible by way of mitigation." (Section 1107.)

Under the authorities, John D. Thomas, Bretherton, and the receiver were trespassers *ab initio*, and their acts particularly described in the complaint cannot be justified. The plaintiff does not demand as damages interest, prospective profits, or exemplary damages, and the allegations of the complaint concerning the extent of the business of the company, or the conduct of said trespassers tending to show fraud, oppression, or malice, must be treated as surplusage. The defendants did not plead any facts in mitigation of damages, and the jury were required to find the market value of said stock of goods, property used in said business, and accounts and bills receivable at the time said receiver took possession thereof, and also the costs and expenses incurred in the *certiorari* proceedings.

The measure of damages is defined by the provisions of the Civil Code:

"Sec. 4270. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault, a compensation therefor in money, which is called damages."

"Sec. 4330. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

"Sec. 4333. The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and (2), a fair compensation for the time and money properly expended in pursuit of the property.

"Sec. 4334. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."

The instructions given and refused are numerous, covering forty pages of the transcript, and will not be quoted fully. The first instruction is a prolix statement of all the issues set forth in the pleadings, regardless of their materiality, but the criticism of appellants that the court displayed therein partiality for the respondent is not well founded.

The third and fifth instructions are attacked because they ignore the questions of malice and want of probable cause. The appellants maintain that the plaintiff must prove the allegations of the complaint touching these matters in order to recover any sum as damages. According to our view of the law, these issues were rightfully eliminated from the consideration of the jury.

It is claimed that the instructions numbered 6 and 17, requested by plaintiff, are inconsistent and contradictory. The sixth instruction embodies sections of the Civil Code, *supra*,

and states that the damages suffered by plaintiff "is the market value of the property at the time of such seizure, or the highest market value of the property at any time between the conversion by said Hubbard and the verdict, less the sum which was returned to plaintiff after said seizure." In this connection we are called upon to read the following part of the seventeenth instruction: "The market value of the property at the time of the conversion by the receiver is the amount recoverable by the plaintiff, less any amount returned to it or applied to its benefit, * * * and you are instructed that the value of the goods is the reasonable market value of the same at the time and place when they were so unlawfully converted." The appellants are right in their contention that section 4333, Civil Code, gives to the injured party one of two options; but he must elect one, and cannot rely upon both in the same case. Under the evidence the seventeenth instruction is correct, and the court erred in declaring in the sixth instruction the measure of the damages to be "the highest market value of the property at any time between the conversion by said Hubbard and the verdict." There is no evidence to which this part of the sixth instruction could apply, and the allegations of the complaint do not permit the assessment of damages in accordance therewith. The instructions must be warranted by the pleadings and evidence. (*Yoder v. Reynolds*, 28 Mont. 195, 72 Pac. 417, and cases cited.)

Was this error prejudicial to the appellants? The decision of this court in *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114, is directly in point. There was a conflict in the instructions, and Mr. Chief Justice Brantly, for the court, said: "That the conflict exists is clear, and it is impossible to reconcile it; but it does not therefor follow that the defendant is entitled to a new trial. The rule is recognized by this court that, where the instructions are upon a material point, and are in conflict, a new trial will be granted, unless it also appears that the defendant has suffered no prejudice. (*State v. Rolla*, 21 Mont. 582, 55 Pac. 525; *Heilbronner v. Lloyd*, 17 Mont. 299, 42 Pac. 853.) If, however, the conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the

jury have been misled, a new trial will not be granted." In *Chicago Co. v. Taylor Co.* (Kan.), 78 Pac. 808, the jury were erroneously instructed that the defendant would be entitled to credit for "the deepening of the well and its connection" with a plant, and the court said: "There is, however, no evidence in the record that any damages were claimed for deepening the well, and no proof was offered as to the cost of deepening the creamery well. Hence the verdict could not have been affected in any sum by the feature of the instruction to which objection is made." It should be remembered that the appellants have not moved for a new trial on the ground that the amount of the verdict is excessive, or that the evidence is insufficient to justify the verdict, and, in our opinion, the appellants could not have been injured.

There is no force in the argument of appellants relating to the sixteenth instruction, and we think the question of the responsibility of the receiver for the failure to collect the account from Mrs. Thornton was correctly submitted to the jury.

We are unable to perceive any inconsistency between the instruction numbered 1, given by the court of its own motion, and instruction numbered 13, given at the request of respondent. The said instruction numbered 1 recites the allegations of the complaint respecting the elements of the damages claimed in this action, and limits the respective amounts which can be recovered, making a total sum of \$22,050. The thirteenth instruction is based upon the evidence with reference to the accounts in the books and the good or collectible notes of the company. The appellants contend that the following sentence in said thirteenth instruction is not law: "You are instructed that accounts having once been shown to be good and collectible are presumed to have continued so, and that the fact that the accounts appear upon the books of the company and are testified to have been good and collectible is evidence for your consideration of the value of those accounts." This presumption is recognized in the Code of Civil Procedure: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * *

That a thing once proved to exist continues as long as is usual with things of that nature." (Section 3266, subsection 32.) Mr. Abbott, in his Trial Brief (second edition), page 433, says: "In the absence of evidence, solvency is presumed. Solvency or insolvency at a given time having been shown, it is presumed to continue within reasonable limits of time."

It is also asserted that the instruction does not inform the jury that some of said accounts and bills receivable were taken possession of under a writ of attachment in the suit of W. A. Clark & Brother against the company to satisfy its indebtedness. Section 4334, Civil Code, covers this objection.

The twenty-second instruction mentions the judgment-rolls in five actions commenced against the company, in which some of the property in the possession of the receiver was levied on under execution and sold, and tells the jury that defendants are entitled to credit for the proceeds of the sales which were applied upon the payment of said judgments. Under the circumstances surrounding this entire transaction, the instruction allowing these amounts to be applied in this manner was favorable to the defendants.

All the instructions requested by the parties bear the names of the respective attorneys, and this is claimed to be error prejudicial to the appellants. The question has been disposed of by this court. (*State v. McDonald*, 27 Mont. 230, 70 Pac. 724; *State v. Martin*, 29 Mont. 273, 74 Pac. 725.)

The instructions requested by the defendants and refused by the court, viewed as a whole, are contrary to the principles of law upheld in this opinion, and, if given, must have resulted in a verdict for the defendants upon every proposition.

All the exceptions presented in the transcript have been examined, and we do not find any error of law entitling the appellants to a new trial.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

Affirmed.

Rehearing denied April 4, 1905.

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418

GREENE, RESPONDENT, v. MONTANA BREWING COMPANY, APPELLANT.

(No. 2,035.)

(Submitted December 17, 1904. Decided February 23, 1905.)

Judgments—Default—Vacation — Inadvertence — Excusable Neglect.

After *remittitur* from the supreme court had been filed, plaintiff filed an amended complaint, which was served on the stenographer of defendant's attorneys during their absence, and, upon defendant's failure to answer, judgment was rendered by default. Immediately on defendant's acquiring knowledge thereof, it obtained a stay of execution, presented a motion to set aside the default, and for leave to answer, alleging that by the negligence of the stenographer the amended complaint had been lost, and had never been called to the attention of its attorneys. One of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the *remittitur*, but the clerk had failed to do so, and, though such attorney met plaintiff's attorney nearly every day, he had never referred to the filing of such amended complaint. *Held*, that such facts, with a proposed answer, which put in issue all the material allegations of the amended complaint, entitled defendant to a vacation of the default judgment, under Code of Civil Procedure, section 774, authorizing the court to relieve a party, in its discretion, from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and that the court erred in overruling the motion.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Howard S. Greene, as trustee in bankruptcy, against the Montana Brewing Company. From an order denying defendant's motion to set aside a default and permit defendant to answer, it appeals. Reversed.

Mr. George H. Stanton and Mr. J. A. McDonough, for Respondent.

It was the duty of appellant's counsel to keep themselves advised with respect to the proceedings in this case. They must have known that the case was decided by the supreme court, and that a *remittitur* could be called for by respondent and filed

with the clerk without any notice to them. It was not the duty of the clerk to inform them of the filing of the *remittitur*. If they had examined the docket they would have found that the *remittitur* was filed, and with it they would have found the amended complaint, duly verified and filed, and showing that the same had been properly served at their office.

No showing of excusable neglect has been made. In the absence of such showing there is no discretion of the court to be exercised. Though a defendant may have a meritorious defense to an action, mere neglect by his counsel to file an answer in time is not a ground upon which a default judgment may be vacated. (*Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135; *Lowell v. Ames*, 6 Mont. 187, 9 Pac. 826; *Butte Butchering Co. v. Clark*, 19 Mont. 306, 48 Pac. 303; *Haggin v. Lorentz*, 13 Mont. 406, 34 Pac. 607.)

Service of the amended complaint in this case was made in the manner provided by statute, and a copy of the same was left in the office of appellant's counsel more than a month before the judgment was taken. If the law contemplated that service upon the clerk in the absence of the attorney was not sufficient unless the clerk delivered such paper to the attorney and notified him of its contents, then it would seem that the statute referred to can serve no substantial purpose. (*Union Hide Co. v. Woodly*, 75 Ill. 435. See, also, *East St. Louis v. Thomas*, 102 Ill. 453; *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762.)

Even in a case where excusable neglect may be shown, a default judgment cannot be set aside in the absence of a sufficient affidavit of merits. The appellant in this case furnished no affidavit of merits. Mere surprise is not sufficient, for the defendant might be surprised and yet the judgment might be entirely just and proper. Every consideration of expediency and justice is opposed to the opening up of cases in which judgment by default has been entered, unless it be made to appear, *prima facie*, that the judgment as it stands is unjust. (*Donnelly v. Clark*, 6 Mont. 136, 9 Pac. 887.)

Messrs. Downing & Stephenson, for Appellant.

Defendant was not in default, because on the date of the entry of the default, defendant had an answer on file in said action. An answer filed to a complaint is to be treated as an answer to every amendment and to every amended complaint subsequently filed. And while such answer is on file the clerk is without authority to enter a default. (*Gettings v. Buchanan*, 17 Mont. 581, 44 Pac. 77; *Yates v. French*, 25 Wis. 661; *Bank of Elkhorn v. Prescott*, 27 Wis. 616; *Bank v. Fairbank*, 54 Ill. App. 296; Ency. of Pl. & Pr., vol. 6, p. 83, and cases cited; Century Digest, vol. 30, columns 262-265.) Defendant had appeared, and demurred and answered, and had taken the case to the supreme court. The default should have recited these facts, and was necessarily misleading to the court, and a judgment based upon such a default is reversible. (*Mason v. Germaine*, 1 Mont. 266.)

The former judgment of the court was reversed. No new trial was granted, no further proceedings were ordered, and no order to the lower court to permit amended pleadings was made. Such a judgment of the supreme court requires a dismissal of the action. (*Edgar v. Greer*, 14 Iowa, 211; *Keller v. Lewis*, 56 Cal. 466; *Patten Paper Co. v. Canal Co.*, 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.) Plaintiff had no right to file an amended complaint without first obtaining leave of court, and upon notice to the attorneys for defendant. The effect of the decision of the supreme court was to sustain defendant's demurrer to plaintiff's complaint. (Sections 776 and 683, Code of Civil Procedure.)

It was a gross abuse of discretion on the part of the trial court to refuse to vacate the judgment and default. (*Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Melde v. Reynolds*, 129 Cal. 310, 61 Pac. 932; *Harbaugh v. Land Co.*, 109 Cal. 70, 41 Pac. 792; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Miller v. Carr*, 116 Cal. 379, 58 Am. St. Rep. 180, 48 Pac. 324.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 23, 1900, an action was commenced in the district court of Cascade county by Howard S. Greene, a trustee in bankruptcy, against the Montana Brewing Company, to recover the sum of \$534.25. Complaint, answer, and reply were filed, the cause tried, and a judgment in favor of the plaintiff rendered, from which an appeal was taken to this court, where it was held that the complaint did not state a cause of action, and the judgment was reversed. (*Greene v. Montana Brewing Co.*, 28 Mont. 380, 72 Pac. 751.) On August 19, 1903, the *remittitur* from this court was filed in the office of the clerk of the district court, and on the same day the plaintiff filed his amended complaint, and made service thereof in the manner hereinafter indicated. On September 9th the default of the defendant was entered for its failure to answer or demur to the amended complaint, and a judgment rendered in favor of the plaintiff for the amount claimed. On or about September 30th an execution was issued, and placed in the hands of the sheriff, who demanded from the defendant the satisfaction of the judgment, and this was the first intimation that the defendant or its attorneys had that an amended complaint had been filed, its default entered, or a judgment rendered. On the same day the defendant applied to the court for, and obtained, a stay of the execution, and on October 1st presented to the court a motion to vacate the judgment, to set aside the default, and permit the defendant to file an answer to the amended complaint. In support of this motion the defendant filed certain affidavits and tendered an answer. Counter-affidavits were filed, and upon the hearing of the motion certain oral testimony was taken. On November 5th the court overruled the motion, and the defendant appealed from the judgment, and from the order refusing to vacate the judgment and set aside the default.

It is only necessary for us to consider one ground of the motion. Section 774 of the Code of Civil Procedure provides, among other things: "The court may likewise, in its discretion, after notice, * * * relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable

neglect; provided, that application therefor be made within reasonable time," etc. No question of mistake or surprise is involved here. The only inquiry for our determination is: Do the facts set forth in the affidavits accompanying the motion disclose such inadvertence or neglect as ought to excuse the defendant and entitle it to have the default set aside?

From the affidavits filed it appears that Laura A. Lake had been employed as a stenographer in the office of Downing & Stephenson, the attorneys for the defendant, from about April 15, 1903; that on the 19th day of August Mr. Stephenson was absent from the city of Great Falls; that Mr. Downing was in his office until about 2 o'clock of that day, when he left for Ft. Benton, where he was detained on professional business for several days; that, about 4 o'clock on August 19th, George H. Stanton, attorney for the plaintiff, appeared at the office of Downing & Stephenson, and asked the stenographer if she ever admitted service of papers for the firm of Downing & Stephenson; she replied that she had never done so, but at Mr. Stanton's suggestion she signed the acceptance of service of the amended complaint with the name "Downing & Stephenson"; that a copy of the complaint was evidently left with Miss Lake, but by her mislaid, and never thereafter seen by her or by either member of the firm of Downing & Stephenson; that she received the impression, whether well founded or not, that Mr. Stanton would speak to Downing or Stephenson about the matter of the service of this paper; that she, in fact, had no knowledge of the character of the paper itself, and gave the matter no further thought; that she never called the attention of either Downing or Stephenson to the fact of the service of the paper, and neither of them, nor any officer of the defendant company, had any knowledge of such fact until the execution was issued. It further appears that Mr. Downing had requested the clerk of the district court to inform him whenever the *remittitur* from the supreme court should be filed in the district court, but that the clerk had never done so; that, although Downing met Stanton almost every day after his return from Ft. Benton, Stanton had never, either directly or indirectly, referred to the matter at all; and, notwithstanding diligent search was made through

the office of Downing & Stephenson, the copy of the amended complaint was never found. The answer tendered with the motion puts in issue all the material allegations of the amended complaint, and must be deemed sufficient for the purpose of the motion. Furthermore, it is made to appear from the record that the utmost diligence was practiced by the defendant on the discovery of its default.

Inadvertence is defined as (1) the quality of being inadvertent; lack of heedfulness or attentiveness; inattention; negligence; (2) an effect of inattention; a result of carelessness; an oversight, mistake, or fault from negligence. (Webster's International Dictionary.) Negligence or inadvertence directly traceable to a party litigant or his attorney, no less excusable than that disclosed by this record, has many times been held sufficient to warrant the opening of a default, and trial courts have not infrequently been reversed for their refusal to set aside defaults under such circumstances.

If these rulings be correct, and if the negligence or inadvertence was directly chargeable to the defendant or its attorneys, and yet would be deemed excusable under the circumstances, how much more cogent the reason for a liberal construction of the rule when, as in this instance, the dereliction of duty is chargeable in the first instance to a clerk or stenographer, who, as the record shows, was unfamiliar with the practice respecting the service of papers, and even with the character of this particular paper itself. Of course, the negligence of Miss Lake is imputed to Downing & Stephenson, and through them to the defendant. But if these facts do not bring the case within the meaning of section 774 above, it is difficult to understand the purpose of that statute or to appreciate its practical utility.

It will not do to say that if the defendant was, or its attorneys were, guilty of negligence whereby the default was occasioned, such default will not be set aside, for the very purpose of section 774 above is to relieve a party who has defaulted, and that, too, through his own inadvertence or negligence, provided, however, that the inadvertence be not gross or the negligence inexcusable. No hard-and-fast rule can be found for the de-

termination of these questions when they arise, and only general principles can be invoked in aid of our efforts to reach a fair and just determination of the question.

At an early date a statute of California, similar in its import to our section 774 above, was considered by the supreme court of that state, and it was then said: "Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." (*Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17.) To the same effect are the decisions in *Reidy v. Scott*, 53 Cal. 69, *Grady v. Donohoo*, 108 Cal. 211, 41 Pac. 41, and *Miller v. Carr*, 116 Cal. 378, 58 Am. St. Rep. 180, 48 Pac. 324.

In *Benedict v. Spendiff*, 9 Mont. 85, 22 Pac. 500, the opinion in the *Watson Case* is cited with approval, and in the later case of *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181, this court again had occasion to reverse a trial court for its refusal to set aside a default, and there laid emphasis upon the design of our statute quoted above, as follows: "Each case in which the court is asked to set aside a judgment upon the ground of excusable neglect in the moving party must be decided upon its own facts. The design and purpose of the statute is to further the administration of justice, so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be

not deprived of any advantage to which he may properly be entitled." (See, also, *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635.)

It is generally considered that statutes of the character of section 774, above, are remedial in their nature, and are to be liberally construed. This view is held by the supreme court of California, as is evidenced by the following language used: "This is a remedial provision, and, under the terms of section 4 of the same Code, which require it to be liberally construed with a view to effect its objects and promote justice, it is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve, rather than impede or defeat, the ends of justice; regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights." (*Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932.)

If possible, an even more concise statement of the same views is made by the supreme court of South Dakota, as follows: "The provisions of this section are exceedingly liberal in their terms, remedial in their character, and were evidently designed to afford parties a simple, speedy and efficient relief in a most worthy class of cases. The power thus conferred upon courts, to relieve parties from judgments taken against them by reason of their mistake, inadvertence, surprise or excusable neglect should be exercised by them in the same liberal spirit in which the section was designed, in furtherance of justice and in order that cases may be tried and disposed of upon their merits. When, therefore, a party makes a showing of such mistake, inadvertence, surprise or excusable neglect, applies promptly for relief after he has notice of the judgment, shows by his affidavit of merits that *prima facie* he has a defense, and that he makes the application in good faith, a court could not hesitate to set aside the default, and allow him to serve an answer upon such terms as may be just under all the circumstances of the case." (*Griswold Linseed Oil Co. v. Lee*, 1 S. Dak.

531, 36 Am. St. Rep. 761, 47 N.W. 955; *People v. Campbell*, 18 Abb. Pr. 1.)

While these views comport with our own ideas of the proper interpretation to be placed upon statutes of this character, we are further fortified in our position by direct legislative enactment. Section 3453 of the Code of Civil Procedure, among other things, provides: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it, are to be liberally construed with a view to effect its objects and to promote justice." Applying this rule to the facts disclosed by this record, and we are of the opinion that excusable neglect is shown, that a meritorious defense is tendered, that due diligence was exercised in presenting the motion, and that the trial court erred in refusing to set aside the default.

The judgment and order are reversed, and the cause is remanded to the district court with direction to set aside the default and permit the defendant to answer.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

OPPENHEIMER, RESPONDENT, v. REGAN, SHERIFF, APPELLANT.

(No. 2,036.)

(Submitted December 17, 1904. Decided February 23, 1905.)

Justice of the Peace—Jurisdiction—Limitations—Amount—Nature of Controversy—Contract—Action Against Sheriff—Appeal.

Pleadings—Jurisdiction—Supreme Court.

1. Under Code of Civil Procedure, section 685, providing that objections, except only the objection to jurisdiction of the court, are waived if not taken by defendant or answer, the question of jurisdiction may be raised for the first time in the supreme court.

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33	215
32	110
35	38
36	180
36	319
36	400

32	110
38	203

Justices of the Peace—Jurisdiction—Appeal—District Courts.

2. Where a justice of the peace had no jurisdiction of the subject matter of an action, the district court could acquire none by appeal.

Justices of the Peace—Jurisdiction—Sheriff—Nonperformance of Duty.

3. Code of Civil Procedure, section 66, subdivision 1, does not clothe justice of the peace courts with jurisdiction to entertain an action brought against a sheriff for damages for nonperformance of an official duty and to recover a penalty imposed by law for its non-performance, such an action not being one arising on contract.

Justices of the Peace—Jurisdiction—Limitations.

4. *Quaere*: Is an action for the recovery of a sum of money which, with statutory penalty and interest at the legal rate, exceeds the statutory limit of \$300, without the jurisdiction of a justice of the peace?

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by J. E. Oppenheimer against P. H. Regan, as sheriff of Silver Bow county. From a judgment in favor of plaintiff, and from an order denying defendant a new trial, he appeals. Reversed.

STATEMENT OF THE CASE.

On June 7, 1898, J. B. Brown and I. A. Heilbronner, as copartners doing business under the firm name of Brown & Heilbronner, recovered a judgment before P. H. Burns, a justice of the peace of Silver Bow county, against J. J. Reilly, T. B. Flood, and Henry Canfield, copartners under the firm name of J. J. Reilly & Co. At the institution of this action the plaintiffs caused an attachment to be issued and to be levied upon all the personal property of the defendants, consisting of a stock of liquors, bar fixtures, saloon furniture, etc. The defendant, as sheriff, executed the writ. On the preceding day I. A. Heilbronner had placed in the hands of the sheriff a certified copy of a chattel mortgage, executed to Heilbronner by Reilly and Flood upon an undivided one-half interest in the property attached, to secure the payment of promissory notes to the amount of \$500, and had directed him to foreclose it. Such proceedings were had by the sheriff under this mortgage and a writ of execution issued upon the judgment that on June 14th, he sold the property, realizing therefrom \$981.55. Out of this sum he paid one-half, \$490.77, toward the discharge of the notes and

mortgage. The remainder he applied first to the payment of the costs of the suit, including keeper's fees, and then to the satisfaction of the Brown & Heilbronner judgment, leaving a balance of \$5.98.

On June 6, 1898, the plaintiff recovered a judgment against the same defendants for \$100.50 before J. M. Trapp, a justice of the peace. On the same day Dallemand & Co. (*sic*) also recovered a judgment in the same court against the same defendants for \$138.50. In both of these latter cases attachments had been issued and put into the hands of T. F. Lowney, a constable, for service, but the record fails to disclose whether he made any levy thereunder. Upon the rendition of judgments, executions were issued and put in the hands of Lowney. These were both placed by him in the hands of the sheriff, the defendant, to be satisfied out of the proceeds of the sale by the sheriff, the plaintiff's execution being prior to that of Dallemand & Co. They were both returned wholly unsatisfied, except that the small balance of \$5.98 left in the hands of the sheriff was applied on the plaintiff's execution. On August 23d thereafter, the plaintiff, having secured the Dallemand & Co. judgment by assignment, brought this action in the justice's court of Timothy Harrington, a justice of Silver Bow county, under section 4389 of the Political Code, to recover the amount of both judgments, with twenty-five per cent damages, and interest from June 15, 1898. A trial in that court resulted in a judgment for the plaintiff for \$298.75 and costs. Thereupon defendant appealed to the district court, where another trial resulted in a judgment for plaintiff for \$239. From this judgment and an order denying him a new trial, defendant has appealed to this court.

Messrs. Kirk & Clinton and Messrs. Forbis & Mattison, for Respondent.

Plaintiff had a right to sue in justice court to recover the money which should have been applied on his judgments and executions had they been levied, or to recover a penalty or fine of any kind provided by statute against an officer for failure to

perform his duty, provided the amount sued for was within the limit of the jurisdiction of the justice court.

In receiving the money, which should have been applied upon the judgments, there is an implied contract on the sheriff's part, that he will pay the same over to them or for their use and benefit. It is upon this right that the first part of section 4389 of the Political Code is based, that they may recover the amount of their judgments. Then as penalties, the two succeeding clauses of the statute are added. It is a well-known and established rule that a party having some right of action upon which a penalty or a claim for damages is also based, may, if he sees fit, exercise his right to recover, and waive his claim of penalty, or any claim in the nature of damages, for a tort committed against him. (*Williams v. McCartney*, 69 Cal. 556, 11 Pac. 186; *Astell v. Phillipi*, 55 Cal. 265; *Wratten v. Wilson*, 22 Cal. 466; *C. V. Q. M. Co. v. Stackhouse*, 6 Cal. 413.)

Under our Code provisions as to jurisdiction of justice courts considered in connection with the statutes referred to in Political Code, there can be no doubt that the justice court has jurisdiction of this character of cases, if the amount does not exceed its limit.

Jurisdiction of actions to recover statutory penalties is generally conferred upon justices, either upon the Act creating the penalty or upon the general law fixing the jurisdiction of justices. Where there is no special provision for jurisdiction to award penalties, it is held to be included in the *general jurisdiction* of actions of debt. (18 Am. & Eng. Ency. of Law, 22; *Indianapolis R. Co. v. People*, 91 Ill. 452.)

The term "damages to personal property" includes all injuries sustained in respect to personal estate, whether direct or consequential. The jurisdiction of actions for injury to personal property includes actions for damages for conversion, unless the sum claimed exceeds the amount to which justice court jurisdiction is limited. (*Gallery v. Davis*, 35 Ill. App. 619; *Park v. Webb*, 48 Ark. 293; *Thompson v. Willard*, 66 Ark. 346, 50 S. W. 870.)

Where justices of the peace have jurisdiction over civil actions, both contract and tort, they will include jurisdiction of

actions against public officers. (*Van Vleck v. Burroughs*, 6 Barb. (N. Y.) 341.) A justice of the peace has jurisdiction of an action of debt against another justice, for demanding and receiving illegal fees. (*Bartolett v. Achey*, 38 Pa. St. 273; *Simon v. Kelly*, 33 Pa. St. 190.)

Mr. Jesse B. Roote, and Mr. A. C. McDaniels, for Appellant.

The defect in jurisdiction of the justice court cannot be obviated by an amendment in the appellate court, and the action should have been dismissed. It is said in the case of *Waterloo Turnpike Road Co. v. Cole*, 51 Cal. 381, that, "It is too clear to require argument that where want of jurisdiction appears on the face of the proceedings, as in this case, anyone injuriously affected may avail himself of the defect, even in a collateral action." (*Deer Lodge County v. At*, 3 Mont. 168; *Zitske v. Goldberg*, 38 Wis. 216; *Lykes v. Schwarz*, 91 Ala. 461, 8 South. 71; *Ladd v. Kimball*, 12 Gray, 139; *Webb v. Tweedie*, 30 Mo. 488; *McMeans v. Cameron*, 51 Iowa, 691, 49 N. W. 856; *Galley v. Tama County*, 40 Iowa, 49; *Sheldon v. Sullivan*, 45 Mich. 324.)

The statute (section 66, Code of Civil Procedure) does not give justices of the peace jurisdiction in cases arising under section 4389 of the Political Code. Where a sheriff fails to pay over money collected on execution, the action should be for a false return. (*Egery v. Buchanan*, 5 Cal. 54; *Johnson v. Gorham*, 6 Cal. 196; *Giffin v. Smith*, 2 Nev. 378.)

The complaint clearly shows that the plaintiff was suing under section 4389 of the Political Code. One suing under this statute must invoke it in whole, or not at all. The statute must be strictly followed. (*Williams v. State*, 65 Ark. 159, 46 S. W. 186; 16 Am. & Eng. Ency. of Pl. & Pr. 229 et seq.; *Bowyer v. Knapp*, 15 W. Va. 291; *Stewart v. Stewart*, 27 W. Va. 179; *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154.)

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

Though many questions are argued in the briefs of counsel, the only one necessary to be decided arises upon the contention

of the appellant that the justice's court had no jurisdiction to entertain the action, and that, inasmuch as the jurisdiction of the district court is appellate and not original, and therefore the same as that of the justice's court, the action should have been dismissed.

It does not appear that the jurisdiction of the justice was challenged before or during the trial, but in the district court the defendant interposed a motion to dismiss on the ground that justices of the peace have no jurisdiction of actions authorized by section 4389, *supra*, and that therefore the district court had none by virtue of the appeal. Whether or not the jurisdiction of the justice's or district court was challenged is a matter of no moment. The question of jurisdiction may be raised at any time, and may be presented in this court for the first time in the case. (Code of Civil Proc., sec. 685.) If the justice's court had no jurisdiction of the subject matter of the action, the district court had none. (*Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385; *Shea v. Regan et al.*, 29 Mont. 308, 74 Pac. 737.)

Section 20, Article VIII, of the Constitution, declares: "Justices' courts shall have such original jurisdiction within their respective counties as may be prescribed by law, except as in this constitution otherwise provided; *provided*, that they shall not have jurisdiction in any case where the debt, claim or value of the property involved exceeds the sum of \$300." The following section (21) prescribes other limitations as to the class of cases jurisdiction in which may not be conferred by the legislature. In pursuance of these provisions, the legislature has prescribed by law (Code of Civil Proc., sec. 66), though in general terms, the class of civil cases which these courts may try and determine. Section 66 provides: "The justices' courts have civil jurisdiction: (1) In actions arising on contract for the recovery of money only if the sum claimed does not exceed \$300. * * * (4) In actions for a fine, penalty, or forfeiture, not exceeding \$300, given by the statute, or the ordinance of an incorporated city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll or municipal fine."

Within the limitations prescribed by the Constitution, the legislature has power to confer jurisdiction upon justices' courts in any class of cases; but these courts, being thus constituted courts of special and limited jurisdiction, are without power to hear and determine any case when such power is not, specifically or by clear implication, conferred by the statute defining their powers.

Now, upon examination of section 66, *supra*, we find, that, if these courts have the power to hear and determine cases authorized under section 4389 of the Political Code, such power must be derived from the provisions of one of the subdivisions quoted *supra*, for the other subdivisions refer to cases undoubtedly of a different nature. The case at bar cannot fall under subdivision 4, for the very obvious reason that this provision grants authority to entertain actions for the recovery of fines, penalties or forfeitures given by statute or municipal ordinance, within the limitation of \$300, but only when the right to recover such fine, penalty or forfeiture is the sole matter in controversy, and when the answer does not question the legality of any tax, impost, assessment, toll, or municipal fine. The power to entertain the action must therefore be found, if at all, in subdivision 1, and in the expression "actions arising on contracts for the recovery of money only."

Is this action one arising on contract? Section 2090 of the Civil Code defines contract to be an agreement to do or not to do a particular thing, and the following section declares that it is essential to the existence of a contract that there should be (1) capable parties, (2) their consent, (3) a lawful object, and (4) a sufficient cause or consideration. This is nothing more than the common-law definition of the term, and is manifestly intended to apply only to those obligations which arise immediately out of dealings between the parties, and not to that sort of contract which arises remotely out of the compact of government. It is only in a remote sense, by a fiction of law, that the duty of a public officer to the individual citizen may be said to rest upon the obligation of a contract, or that the contract of principal and agent may be said to exist between them. The law imposes duties upon the public officer, and the citizen

does not occupy toward him the relation of principal, so that, by virtue of the fact that, when the citizen places process in the hands of an officer, he assumes responsibility for his acts, or must pay him for the performance of his duty any other compensation than that which the law provides. Oftentimes no compensation is provided for a particular duty, yet the duty required must nevertheless be performed, and the officer may not lawfully demand compensation therefor.

The gist of this action is the recovery of damages for the non-performance of official duty, and of the penalty imposed by the law for its nonperformance. It cannot be said, then, that the defendant owed such a special duty or obligation to the plaintiff as that, when the latter put process in his hands, there arose by implication an agreement on the part of the defendant that plaintiff's judgment should be satisfied out of any funds derived from the sale of the property belonging to the defendants named therein, without regard to the judgment and discretion of the defendant as to the duties owed to other persons occupying relatively the same position toward him. In enacting the law, the legislature evidently had in view a contract in its ordinary or proper sense, and not an agreement resting upon a fiction of law. Inasmuch as the statute (section 66) grants powers under limitations prescribed by the Constitution—which are mandatory and prohibitory—it must, for this reason, be construed as not to grant others than those which come clearly within its terms, or which are necessarily implied thereby. This rule excludes the idea of the liability arising *ex delicto*, even though, by fiction of law, it might be said in some remote sense to be a liability arising *ex contractu*, and authorizing a suit for a specific sum of money.

The meaning of the term "contract," here adopted, has been held by other courts to be obviously the correct one. (*Merfield v. Burkett*, 56 Ark. 592, 20 S. W. 523; *Montgomery v. Poorman*, 6 Watts, 384.) But, in the absence of such holdings, we should be constrained to limit its meaning to the extent indicated, without intending to infringe the rule that in some cases the officer may be held liable to action for money had and received, at the suit of the party aggrieved. In the absence of

such a provision as section 4389, the plaintiff would be compelled to resort to an action for a false return, or to some other form of action *ex delicto*.

Much was said in the argument of counsel upon the question whether this action could be maintained under the facts of this case in any event, and whether or not the plaintiff should have brought an action for a false return. Under the view we have taken of section 66, *supra*, it is not necessary to decide this question.

It will be noticed that under the prayer of the complaint the claim demanded in the two counts thereof is for the amount of the two judgments, \$239, with twenty-five per cent penalty, and interest at the legal rate. The action having been brought under section 4389, the legal rate of interest is ten per cent per month. The amount of the judgment demanded, therefore, is in excess of \$300; or, if the language of the prayer of the complaint be construed to demand not more than the ordinary legal rate of interest upon money loaned, which is eight per cent per annum, the amount of the judgment demanded is still in excess of \$300. In either event, the claim is in excess of the statutory limit, and, though this phase of the case is only incidentally referred to in the briefs, the inquiry naturally arises whether or not, for this reason also, the action is not without the jurisdiction of the justice. In many states it is held, under statutory provisions similar to ours, that the jurisdiction of the justice is to be determined by the amount of the claim demanded, and that *remittitur* of the excess over the statutory limit after suit brought does not clothe the justice with jurisdiction to proceed with the trial of the case. This question it is not necessary to decide, inasmuch as the conclusion already reached determines the case. A very interesting discussion in this connection may be found, however, in the case of *Plunket et al. v. Evans*, 2 S. D. 434, 50 N. W. 961. (See, also, *Nelson v. Ladd et al.*, 4 S. D. 1, 54 N. W. 809; *Purcell v. Booth*, 6 Dak. 17, 50 N. W. 196; *Ball v. Biggam et al.*, 43 Kan. 327, 23 Pac. 565; *Lovejoy v. Woolfolk*, 105 Ga. 252, 31 S. E. 164; *Bowden et al. v. Taylor*, 81 Ga. 199, 6 S. E. 277; 2 Current Law, p. 653; *Knight v. Taylor*, 131 N. C. 84, 42 S.

E. 537; *Warder, Bushnell & Glessner Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900; *Shealor v. Superior Court*, 70 Cal. 564, 11 Pac. 653; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Everett Piano Co. v. Bash*, 31 Ind. App. 498, 68 N. E. 329.)

The justice's court not having jurisdiction of the action, the result is that the district court had none, and that the judgment and order must be reversed. It is accordingly so ordered, and the district court is directed to dismiss the action.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY CONCUR.

CAMPBELL, APPELLANT, v. FLANNERY ET AL., RESPONDENTS.

(No. 2,026.)

(Submitted December 14, 1904. Decided February 23, 1905.)

Waters and Watercourses—Injunction—Easement—Estoppel—Representations of Codefendant—Pleadings.

Public Lands—Entry—Ditches—Easement.

1. Where lands have been withdrawn from the public domain by entry, and a ditch and its uses were a burden thereon by grant from the government at the time of the entry, such burden cannot be added to in favor of a third person under Act of Congress of July 26, 1866 (14 Stat. 251, chapter 262), giving citizens the privilege of running a ditch over unoccupied government lands.

Easement—Parties to Action.

2. An easement claimed on lands in possession of defendants cannot be adjudged in a suit to which the owner is not a party.

Water Rights—Pleadings—Agents—Unauthorized Representations—Estoppel.

3. Where, in a suit to restrain interference with the flow of flood waters in certain ditches, it is not alleged that a codefendant, who *professed* to be authorized to sell the land, was the agent of the owner or empowered to make any representations for him, and the other defendants are not connected with his statements, they are not estopped to deny plaintiff's right to transmit waters through the ditches by representations of such codefendant, made before plaintiff's purchase, that the waters were carried through the ditches.

Res Judicata—Pleadings—Evidence—Findings.

4. Where plaintiff's equities have been presented under his complaint and in his evidence, and the defendant has failed to introduce any evidence, the trial court's finding that under the evidence plaintiff had not established his case, or had any equities, is *res judicata*, if the court's holding was correct.

Injunction—Pleadings—Tenants in Common—Waste.

5. (On motion for rehearing.) Where, in a suit to restrain interference with certain ditches, the complaint does not allege that defendants are tenants in common with plaintiff, but its theory is that defendants neither have nor claim any interest in the premises, defendants cannot be enjoined from cutting or damming the ditches on the theory that they are tenants in common, and, as such, cannot lawfully commit waste.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

SUIT by N. S. Campbell against William and Ida B. Flannery. From a judgment granting a motion for nonsuit, plaintiff appeals. Affirmed.

Messrs. McConnell & McConnell, and Mr. John A. Luce, for Appellant.

The respondents, being tenants in common with the appellant, cannot commit waste upon a ditch in which they are such tenants in common, and an injunction will lie to prevent it, both upon the ground of preventing repeated trespasses on the part of the respondents and on the ground of insolvency.

The common-law rule upon this subject is stated in 11 Encyclopedia of Pleading and Practice, page 769, as follows: "The common-law rule, as hereinbefore shown, not permitting one joint tenant or tenant in common to have an action *ex contractu* against his companion unless as bailiff, his only remedy was by bill in equity; but the change in the rule, giving an action, did not abridge the remedy in equity in proper cases, and where a case is presented involving a variety of adjustments, limitations, cross-claims or other complications, a court of equity will afford the parties superior facilities for effecting distributive justice between them, as well as in other cases where the relief sought is peculiar to a court of equity." (Referring to the following cases: *Hamilton v. Comine*, 28 Md. 635, 92 Am. Dec. 724; *Dyckman v. Valiente*, 42 N. Y. 549;

Early v. Friend, 16 Gratt. 41; *Smith v. King*, 50 Ga. 192; *Freeman on Cotenancy*, 2d ed., sec. 394; *Carter v. Bailey*, 64 Me. 465, 18 Am. Rep. 273; *Blood v. Blood*, 110 Mass. 545; *Bliss v. Rice*, 17 Pick. 23; *Stout v. Curry*, 110 Ind. 515, 11 N. E. 487; *Twort v. Twort*, 16 Ves. Jr. 128; *Obert v. Obert*, 5 N. J. Eq. 408; *Hawley v. Clowe*, 2 Johns. Ch. 122; *Kennedy v. Scovil*, 12 Conn. 317; *Valloue v. Wood*, 8 Cush. 48.)

Malicious waste may be sufficient ground for injunction, but not purely equitable waste. (*Hole v. Thomas*, 7 Ves. Jr. 589.) The court will grant an injunction only where the waste complained of is malicious or destructive or attended with peculiar circumstances warranting such relief. (17 Ency. of Law, 2d series, p. 705, note 7.) The case at bar is one in which both malicious conduct and insolvency appear.

But we do not have to rely upon the common law, or the general principles governing courts of equity, but the statute, sections 586 and 592 of the Code of Civil Procedure, unmistakably give us the right to maintain this suit. (*Anaconda Copper Min. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924.) This case was approved in the case of *Red Mountain Min. Co. v. Essler*, 18 Mont. 174, 44 Pac. 523, *Connole v. B. & M. Co.*, 20 Mont. 524, 52 Pac. 263, and *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642. The respondents are estopped to deny the appellant's right to transmit these flood waters through the Flannery ditch and the Penwell ditch to the Gallatin river. "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation will be precluded from contesting its truth." (11 Am. & Eng. Ency. of Law, p. 431, and cases cited in note 1.)

Actual intention to mislead is not necessary to work estoppel. (11 Am. & Eng. Ency. of Law, p. 431, and authorities in note 2.) Estoppel may arise by acquiescence and by conduct where there is no intention to deceive and without any actual culpability. (*Radford v. Gaskill*, 20 Mont. 293, 50 Pac. 854; *Mor-*

risson v. Clark, 24 Mont. 516, 63 Pac. 98.) Where parties have agreed upon a boundary line, or a fence has been built upon a line, and property has been transferred with reference to the conditions existing at that time, the parties are estopped from controverting such boundary line. (*Magee v. Stone*, 9 Cal. 600; *Sneede v. Osborne*, 25 Cal. 619; *Columbet v. Pacheco*, 48 Cal. 395; *McCormick v. Barnum*, 10 Wend: 105-109; *Perkins v. Gray*, 3 Serg. & R. 132; *Hagey v. Detweiler*, 35 Pa. St. 412; *Rockwell v. Adams*, 6 Wend. 467; *Rockwell v. Adams*, 7 Cow. 761; *Jackson v. McConnell*, 12 Wend. 421.) See further regarding estoppel by conduct: *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, opinion, 790; *Territory v. Cooper*, 11 Okla. 699, 69 Pac. 813, opinion, 816; *Pacific Improvement Co. v. Carriger* (Cal.), 68 Pac. 315-318; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. It is certainly not necessary that there should be any other parties to this suit to enable us to maintain it upon the ground of estoppel.

The Act of Congress of July 26, 1866, section 9, operates both retrospectively upon existing rights and prospectively upon such rights as might be acquired in the future. The Act in effect grants the right to construct such ditches where it was allowed by local customs, regulations or decisions of the courts. It was not necessary that there should be both local customs and decisions of the courts. Either one was all that was necessary. So long as lands remained public domain and there existed local customs and decisions of the courts allowing ditches to be constructed thereupon the settler could not prevent their construction, but was remitted to his remedy of an action for damages inflicted upon his possessory rights by the construction of such ditches. (*Hobart v. Ford*, 6 Nev. 77; *Jennison v. Kirk*, 98 U. S. 453; *Broder v. Water Co.*, 101 U. S. 276; *Basey v. Gallagher*, 20 Wall. 683; *Jacob v. Lorenz*, 98 Cal. 335.)

Mr. Eugene B. Hoffman, and *Mr. T. J. Walsh*, for Respondents.

Having in mind the elements of an estoppel as stated in *Brigham Young Trust Co. v. Wagener*, 12 Utah, 1, 40 Pac.

764, the complaint is insufficient as the foundation of any right in the plaintiff on that ground. It does not aver that appellant was ignorant of any fact concerning which Flannery made any representation, nor does it aver that he had no convenient means of obtaining information, nor does it aver that any representations made by Flannery were made with the intent that the appellant should act on the same. (*Wythe v. Salem*, 4 Saw. 88, Fed. Cas. No. 18,121; 8 Ency. of Pl. & Pr. 10; *Meyendorf v. Frohner*, 3 Mont. 282; *Fabian v. Collins*, 3 Mont. 215; *Attikisson v. Plumb*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; *Biddle Boggs v. Merced*, 14 Cal. 279.)

"Matters pleaded by way of equitable estoppel must be of such a character and sufficient, as pleaded, to make a cause of action for deceit." (*Brigham v. Wagener*, 12 Utah, 1, 40 Pac. 764.) The representation which is made the basis of an estoppel must be of some material fact. (*Meyendorf v. Frohner*, *supra*; Bigelow on Estoppel, 1st ed., 480.)

This is an attempt to establish an interest in an easement over the lands of Toohey, now occupied by respondents, by parol, notwithstanding the provisions of the statute of frauds. The rule is universal that in such cases the facts must be established by evidence of the most satisfactory character. Such is the rule in cases of attempts to enforce specific performance of oral contracts for the sale of land. (*Purcell v. Miner*, 4 Wall. 513.) In cases where a trust in lands is sought to be established by parol. (*Howland v. Blake*, 97 U. S. 624.) And in cases of estoppel *in pais* affecting the title to real estate. (*Corning v. Troy*, 39 Barb. 311, 323, 324; *Rust v. Bennett*, 39 Mich. 521.) In fact, it is quite generally held that in such cases a fraudulent intent on the part of the party charged to have made the representations is necessary. (*Biddle Boggs v. Merced*, 14 Cal. 279.) 2 Pomeroy's Equity, 805, 807, page 1121, calls attention to the distinction between estoppel as affecting the title to real estate and as arising in other situations not complicated by the provisions of the statute of frauds. (*Brant v. Virginia*, 93 U. S. 326.)

No decree can be made in this case saving the rights of Toohey. Every day that this water runs down over his land

brings nearer the time when a right by prescription can be asserted against him by Campbell. He is an indispensable party to this action. (1 Beach's Modern Equity Practice, 58, 59; *Gregory v. Stetson*, 133 U. S. 579; *Shields v. Barrow*, 17 How. 130-141; *Woodward v. McConnaughey*, 106 Fed. 758; Hawes on Parties, 26; Pomeroy's Code Remedies, 4th ed., 228.)

It appears to be contended that by some sort of construction which it is claimed should be given to the Act of Congress of July 26, 1866, one can invade the claim of a homesteader at any time before patent is issued to him and cut a ditch through his front yard, or his garden, or his potato patch. The counsel says that "the only remedy which the settler had as against the construction of such ditches was an action for damages." This argument was made to and refuted by the supreme court of California. (*McGuire v. Brown*, 106 Cal. 671, 39 Pac. 1060.) A settler on the public domain is as secure in his possession against intrusion as an owner in fee. (Long on Irrigation, 66.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This is a suit for an injunction to prevent the defendants from cutting the levees of, or damming up, or in any other manner interfering with a certain ditch, for thus, it is alleged, certain waters are prevented from flowing therein, thereby causing the overflowing and flooding of plaintiff's land; and, further, that there may issue a mandatory injunction commanding the defendants to remove certain obstructions from the ditch, else to cut a gate in the same, in order to allow the free and unobstructed flow of the water into another ditch. In other words, the plaintiff desires to have the defendants restrained from turning certain flood waters out upon his land.

It is alleged in the complaint, and appears to be the fact, that the plaintiff, since the fall of 1897, has been the owner of and in possession of a tract of two hundred acres of land; that the defendants at the time of the filing of the complaint, and at certain times thereinbefore mentioned, have been in the posses-

sion of a certain tract of about one hundred and sixty acres of land, adjoining plaintiff's land; that from a certain point in the East Gallatin river south of the lands, a ditch called the "Flannery Ditch" runs in a northerly direction to the bed of Cottonwood creek, thence in the creek-bed, thence westerly. The bed of the creek is used as a ditch to a point close to the southeast corner of the tract, which embraces all the lands mentioned. The creek-bed from that point runs in a diagonal course, leaving the said tract of land near the northwest corner thereof, almost all of the creek-bed in the said tract being upon the lands of the plaintiff. The said ditch, after leaving the Cottonwood creek, turns to the left, and joins a ditch called the "Penwell Ditch" at a point on the lands occupied by the defendants, the Penwell ditch then running on the latter's land in a northerly direction. The plaintiff alleges that the defendants cut the levee of the said Flannery ditch, and turned the waters out of the same so that they ran down to the old creek-bed, where they had not flowed "since the early eighties"; that the plaintiff rebuilt the said levee, and that then the defendants put a dam across the ditch where it is taken out of the creek-bed, and turned the whole volume of water back into the creek-bed where it would flow across the plaintiff's premises, to his great injury; that the plaintiff immediately tore the dam out, and allowed the water to continue in its course down the ditch; and that the defendants threaten to put the dam in again. The defendants admit that they did as alleged, and say that they intend to do it again. Hence this suit.

The defendant William Flannery years ago owned the land now belonging to the plaintiff, but by several transfers it became the property in fee of the plaintiff. It appears that the creek is dry a greater portion of the year, and only carries water in the spring and the early summer; and that the artificial ditch running from the creek was constructed long before the plaintiff purchased the land, which he bought in 1897.

It becomes necessary to consider that the plaintiff alleges in his complaint that prior to his purchase of his (plaintiff's) land the defendant William Flannery went with him, and showed him the lands bought by plaintiff, and "proposed to

sell the same to him, and also to sell a tract of land upon which he now lives, and through which the said Cottonwood creek also passed, and represented to plaintiff that the channel had been changed to the Flannery and Penwell ditches, and the same was used to carry off the surplus water of Cottonwood creek, and plaintiff was induced to purchase said lands by such representations; and at the time the defendant so showed the plaintiff these lands and this channel the same had been plowed and cultivated and were not used, and had not been used, as plaintiff is informed and believes, for a number of years, as the channel of said Cottonwood creek; and the purchase of said lands by plaintiff was made with reference to its condition at that time as pointed out by said William Flannery; said William Flannery at said time *professed* [*italics ours*] to be authorized to sell the same; that the channel of said creek on plaintiff's lands had been practically reclaimed and cultivated, and improvements had been made upon it, before plaintiff's purchase of the land, by the defendant William Flannery, and the improvements which plaintiff had put upon the creek-bed since he became the owner were made with the knowledge and acquiescence of the defendants; and that he was led to purchase the lands by the conduct aforesaid of William Flannery."

It is alleged and admitted that the plaintiff is the owner of an undivided interest in, and is a tenant in common of, the Flannery ditch from the point of its connection with the East Gallatin river to its terminus in the Penwell ditch, with one Pat Toohey, Benjamin Graham and Joseph Davis, except that the defendants deny that the plaintiff has any interest in the ditch beyond the point where the same departs on the west from plaintiff's land. Defendants admit that plaintiff has a right to the use of the water which he has appropriated from the East Gallatin river upon his premises, bringing it through said ditch. The land occupied by the defendants upon which the ditch runs after leaving the bed of the Cottonwood creek does not belong to the defendants, or either of them, and is merely in their possession under a lease and contract to buy.

The cause was tried before the court without a jury, it having been expressly waived by the parties. After the evidence

for the plaintiff was all in, the defendants interposed what was called "a motion for nonsuit," which was granted. The error assigned is that the court erred in sustaining this motion and in entering judgment for the defendants.

After a short statement of the case, the appellant in his brief submits what is denominated "Argument," it being, in our opinion, a statement of facts merely, being a consideration of the evidence tending to show that certain conclusions of the appellant as to what the findings of fact should have been are well founded. Next comes the "Legal Argument," (1) the first legal proposition being that the respondents, as tenants in common with the appellant, may not commit waste on the ditch in which they are such tenants in common, and that an injunction will lie to prevent it, both upon the ground of preventing repeated trespasses on the part of respondents and on the ground of insolvency. (2) The next point is that respondents are estopped to deny the appellant's right to transmit these flood waters through the Flannery ditch and the Penwell ditch to the East Gallatin river. (3) Then follows an argument seemingly in support of the proposition that William Flannery is the equitable owner of the lands over which runs the ditch after leaving the Campbell lands, the land having been patented by the United States to his mother, Catherine Flannery; the idea of counsel being that she was his representative in getting title from the United States, he having abandoned his attempt to take it up under the timber culture Act, and she taking it as a homestead. From certain other facts in the case counsel endeavors to establish his contention that Mr. Flannery is, and always has been, the owner of the Toohey land. This point we need not give any attention to in the consideration of a suit of this character. (4) The further point is made that at the time that defendant Flannery owned the plaintiff's land, and long before the acquisition thereof by the latter person, he (Flannery) owned an easement on the lands now in his possession, to wit, Toohey's lands, and that that easement is a servitude on the Toohey land, and runs to Campbell by mesne conveyances. Counsel further assumes that at the time of the passage of the Act of Congress of July 26, 1866 (14 Stat. 251, c.

262), granting the right to settlers to run and maintain ditches upon public lands, the lands now occupied by respondents were still public lands, and had become burdened by the running of the ditch over them, and that therefore those who obtained title thereto and their grantees held the land subject to such burden or servitude, the Penwell ditch having been constructed in 1864, at which time there was not any settler upon the lands so now in possession of the respondents.

There is some testimony in the case, and there are certain allegations in the complaint, which seem to have been introduced and set up for the purpose of establishing an easement upon the lands occupied by the respondents by prescription, but counsel states that he does not rely upon prescription.

The plaintiff claims that he has an easement on what is called the Toohey lands, the burden upon the land being his right to have the flood waters of Cottonwood creek carried through the Flannery and Penwell ditches, rather than have them go over his land. An easement is obtained either by prescription or grant. In this case appellant expressly declares in his brief that he does not rely upon prescription. It seems that the grant upon which he relies is an implied grant in the Act of Congress of July, 1866, giving citizens the privilege of running a ditch over unoccupied government lands. The Penwell ditch was first located in 1864. The part of the Flannery ditch running from the creek to the Penwell ditch for the purpose of carrying off the flood waters seems to have been made and connected with the latter ditch in 1890. If the burden of carrying these flood waters came to be at any time a servitude upon the Toohey lands, it certainly could have been not earlier than 1890; but Catherine Flannery, the mother of the defendant William, had the possession of these Toohey lands transferred to her by William in 1885, at which time she undertook to initiate a homestead right under which she received a patent in 1891. The government could not grant to Campbell, the plaintiff, an easement upon the lands entered by Catherine Flannery and withdrawn from the public domain. This is enough to say to dispose of the idea of a grant from the United States to Campbell of any easement upon the Toohey lands. If the

Penwell ditch and its uses were a burden upon the land by grant of the United States at the time Mrs. Flannery entered the same, such burden could not be added to as against her in favor of Campbell or anybody else by the United States under the Act referred to, after the lands were withdrawn by her entry.

It appears from the evidence that one Toohey owns the Toohey lands, in possession of defendants, upon which plaintiff claims an easement; that is, the right to have the flood waters run over the said lands in the Flannery ditch. As to find for the plaintiff it would be necessary for the court to conclude that there was such a burden upon the said lands, it is apparent that such an easement may not be adjudged in a suit to which Toohey is not a party.

The main point in this case to be considered, and the one upon which respondent seems principally to rely, is the question whether or not the defendants are estopped by the conduct of the defendant William Flannery in going with the plaintiff upon the land just before the purchase in 1897, and showing him the same, and telling him that the flood waters formerly going down the creek no longer ran over the land, but were carried around through the ditches. We cannot understand how the defendants or either of them is estopped. There is nothing in the complaint in any wise connecting Ida B. Flannery, one of the defendants, with the acts or statements of William. There is not any allegation in the pleading that William was the agent of the owner of the land, or authorized to represent him, or to make any representations for him. The statement simply is that he *professed* to be authorized to sell the land. There is not even a statement that he did sell it, or had anything to do with selling it. The evidence in fact shows that the plaintiff got the land from somebody else, who acted as agent. We cannot understand how, if a stranger to the owner of the land makes false representations to a person who buys the land in a subsequent transaction with a party not connected with the one making such representations, the person so making false statements at one time can be estopped in another matter, such as the case at bar, at another time, any more than if

a stranger to the selling of a horse, having no interest in the transaction, should, without the knowledge of the owner, falsely represent the qualities thereof to the would-be purchaser, who bought the animal on the strength of those representations, such owner of the horse could be held liable, and estopped to deny the statements of the officious person, in case the animal turned out to be worthless.

Furthermore, the evidence of the plaintiff shows that at the time Flannery made these representations, if he did make them, the creek-bed on the land bought by the plaintiff had been cultivated, had stubble upon it, had willows growing upon it, and the dam which prevented the waters running down upon the land had a clump of large willows upon it eight or ten feet high; all of these circumstances showing conclusively, according to plaintiff's testimony, that the water had not gone down the creek-bed for a great while, and that the creek-bed had not been a watercourse over the land which he bought for a long time.

The motion of respondents is not strictly a motion for nonsuit, but a motion for judgment for the defendants. The alleged equities of the plaintiff's case having been presented in the evidence and under his complaint, and no evidence having been introduced by the defendants, it was the duty of the court to determine whether or not plaintiff had established his case, or had any equities. The court found that under the evidence he had not, and under the law as laid down in *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749 (see, also, cases cited in Am. & Eng. Ency. of Law, 2d ed., pp. 801-803), this case is *res judicata*, if the holding of the court was correct, as we think it was.

We do not find that the court erred in its ruling on the motion of defendants complained of, and the judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE HOLLOWAY, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

ON MOTION FOR REHEARING.

(Submitted March 21, 1905. Decided March 31, 1905.)

MR. JUSTICE MILBURN delivered the opinion of the court.

A motion for rehearing has been made and submitted in this case. Appellant adverts to the fact that the point by him made, to wit, "that the respondents, as tenants in common of the ditch, may not commit waste on the ditch in which they are such tenants in common," was not discussed by us. It was not necessary to consider the point. The reference is to the Flannery ditch. The complaint does not allege that the respondents are tenants in common in the Flannery ditch with the plaintiff or with anyone. Although the prayer of the complaint is to have respondents restrained from damming or cutting the ditch, the object of the suit, as disclosed by the pleadings, is to prevent injury to the lands of the plaintiff, in which defendant respondents have not, and do not claim, any interest whatever. They could not commit *waste* on the plaintiff's land in which they do not claim any interest as occupants or otherwise. They, as tenants in common, cannot be enjoined from cutting or damming the ditch, for the reason that there is a want of sufficient allegations as to such tenancy, and, further, for the reasons stated in the original opinion.

Motion denied.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part herein.

IN RE DYE.

(No. 2,166.)

(Submitted February 17, 1905. Decided February 23, 1905.)

*Habeas Corpus—Judgment Nunc Pro Tunc—Special Terms.**Habeas Corpus—Authority of Sheriff.*

1. Where petitioner in *habeas corpus* is legally in custody, it is immaterial when the officer got his authority to hold him, if he obtained it before he made return, and the authority appears in the return.

Habeas Corpus—Oral Judgment—Judgment Nunc Pro Tunc—Special Terms.

2. Under Penal Code, section 2753, providing that the court, if the time during which a party may be legally detained in custody has not expired, must remand him if he is detained in custody under final judgment of any competent court of criminal jurisdiction, or of any process issued on such judgment, where a petitioner for *habeas corpus* was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge.

ORIGINAL application by Wallace Dye for writ of *habeas corpus*. Dismissed.

Mr. S. C. Herron, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. J. J. Kerr*, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This matter is before us upon the petition of Wallace Dye to be discharged from the actual custody in which he is held by the sheriff of Valley county. The petitioner was tried in the district court of that county for the crime of murder. A writ of *habeas corpus* having been issued by order of this court on the 6th day of February, 1905, directed to the sheriff, he makes return that he holds the petitioner in his custody by

virtue of a commitment issued by a justice of the peace in said county upon the preliminary examination, and "by virtue of a certain commitment issued out of the district court * * * on the 9th day of February, A. D. 1905, upon a judgment rendered against him in the said district court on the 28th day of November, A. D. 1904, by which said commitment [he] was commanded to deliver the said Wallace Dye into the custody of the warden or other officer in charge of the state prison of Montana." The sheriff, in the return, further states that at the time said commitment issued out of the district court there was given to him an order of said court staying all proceedings under the judgment until after its decision upon a motion for a new trial, and that by virtue of that order the petitioner is kept in his custody.

The records and files of the district court in this case were produced before us by the clerk of that court, he having been served with a *subpoena* at the instance of the petitioner. There was not any point made by respondent as to the absence of proceedings in *certiorari* as ancillary to *habeas corpus*, or as to the manner in which the record was brought before us, and we shall consider what appears in the records.

The defendant having been convicted of murder in the second degree, the court, at the same term in which the conviction was had, orally rendered its judgment that the prisoner be confined in the state's prison for twenty-five years. This judgment was not entered at the time it was rendered, or at all during the term. In fact, there was not any record whatever made of this judgment in any of the books or papers of the court at that time. There is in the files a paper dated November 28, 1904, reading thus: "In this case it is ordered that all proceedings under the judgment just rendered be suspended until after the decision of the court upon motion for new trial." There not being any filemark upon this written order, we do not know when it was filed in the case. The clerk on the 9th day of February, 1905, made a certified copy thereof, and it was delivered to the sheriff. After the issuance of the writ of *habeas corpus* the district judge went to the county seat of

Valley county, and, without any public notice of his intention, opened a special term of court. The county attorney and the defendant and his attorney were notified, and came into court. The judge caused the minutes at that time to show that it was a special term of court, and that the minutes of the regular term in November of last year did not show that the judgment had been rendered against the defendant. The court caused the county attorney and the defendant's counsel to be sworn. They were examined as to the facts, and, from their testimony and the court's knowledge, the court found that a judgment had been rendered on the 28th day of November, in effect as hereinbefore stated. Thereupon the clerk was directed to "correct" the minutes of the November term so that they would show the judgment of the court as rendered. Upon this judgment, thus discovered and entered, a commitment was then and there, at this special term of court, on the 9th day of February, 1905, made out and given to the sheriff; and this is the commitment upon which the sheriff bases his return, in part. Notwithstanding this action of the court at this special term after the commencement of the *habeas corpus* proceedings, the petitioner still says that he is illegally deprived of his liberty.

This is an anomalous and unusual state of affairs. As to the first reason why the sheriff says he is keeping the prisoner (that is, that he had a commitment made out by a justice of the peace upon preliminary examination), we have only to say that it is not necessary to discuss the point, as the commitment from the district court after judgment is in the hands of the sheriff, and it is this judgment that at this time the officer should obey.

The question before us to be determined is whether or not the commitment under the judgment of the court, made under the circumstances above stated, is sufficient authority for the sheriff to hold the prisoner. The fact that the commitment was made after the writ of *habeas corpus* was sued out is not of any importance. If the petitioner is legally in custody in this case, it does not make any difference when the sheriff got his authority to hold him, provided he got it before he made

his return, and such authority appears in the return. The policy of the law is not to discharge people who should be legally held, if any legal reason appears why they should be detained. Its intention is to liberate the citizen who is detained illegally and without warrant of law. The prisoner, so far as the record before us shows, was duly tried and convicted, and judgment was rendered against him at the term at which he was convicted, and was afterward entered in accordance with an order made at the special term referred to above. Under what we consider the better authorities, the court was authorized to make the records speak the truth, and to do it as soon as possible after discovering the laches of the judge and of the clerk.

Under the law of this state, a judge may call a special term of court, and, strange as it is, it seems that he may call a special term without any formality and without any notice, whereas publication of the times of holding regular terms must appear in the newspaper, the object of such publication being to give notice to all litigants that they may attend and give attention to their own business which may be called up during the term. In this case all the parties had notice, and were actually present. There is not any dispute about the judgment having been rendered at the November term. The truth of the statements made in the return of the sheriff is not attacked.

The Penal Code (section 2753) says: "The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody * * * (2) by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment." It appearing that the petitioner has been committed to the custody of the sheriff by virtue of a judgment, and a process issued thereon, and that he is now in the custody of the officer under such judgment and process, and it not appearing that the jurisdiction of the court was or has been exceeded, or that the detention has since the judgment become unlawful, or that the process is so defective in matter of substance as to

render it void, or that the process has been issued in a case not allowed by law, or that the person detaining the prisoner is not the person allowed by law to detain him for the purpose of carrying out the judgment of the court, or that the process is one not authorized by any order, judgment, or decree of any court, or by any provision of law, or that the prisoner has been committed on a criminal charge without reasonable or probable cause, he may not be discharged, as he should be, were the opposite the case. (Section 2754, Penal Code.)

The only question before this court is: Shall the prisoner be given his liberty by order of this court? The only answer is that he is not entitled to his liberty. There are numerous other phases of this case which we might discuss, but all that we might say would be *dictum*; and we merely add that the duty of the sheriff is plain, under the order of the court, and that the order of court suspending the operation of the sentence is one not known to law—it not being a certificate of probable cause, asked for or obtained in the manner as provided by the statute.

If, when the writ was sued out in this court, the sheriff did not have anything that was sufficient, in law, to show why he held the prisoner, and if there was not then any record in the district court justifying the detention of the petitioner, still, since then the records and a commitment have been made up and supplied, and, under the authorities, we must hold, as we do, that the prisoner is legally in the custody of the sheriff for the purposes mentioned in the judgment; and therefore the writ is quashed, the proceedings dismissed, and the prisoner remanded.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

CARMAN, RESPONDENT, v. MONTANA CENTRAL RAILWAY COMPANY, APPELLANT.

(No. 2,050.)

(Submitted December 19, 1904. Decided March 1, 1905.)

Railroads—Stock Killing—Negligence—Damages—Sufficiency of Evidence—Hypothetical Questions—Taking Papers to Jury-room—Review of Evidence.

Verdict—Evidence—Appeal—Judgment.

1. Whether a verdict is supported by any substantial evidence, being a question of law, may be determined on appeal from the judgment.

Railroads—Killing Stock—Evidence—Negligence.

2. In an action against a railroad company for killing cattle, the engineer testified that a curve in the track prevented his seeing the cattle until he was about two hundred feet from them; that the train was running between forty-one and forty-two miles per hour, and was equipped with air-brakes, which were in first-class condition; that on seeing the cattle he made "an emergency application of the brakes" and gave the stock alarm; that he did all he could to prevent striking the cattle; that he stopped the train within six hundred feet; and that to stop within one thousand feet would be a good stop. *Held*, that this testimony being uncontradicted, and there being no evidence of negligence, a verdict for defendant should have been directed.

Railroads—Killing Stock—Value—Evidence—Indefiniteness—Judgment.

3. Where three of plaintiff's animals were killed and three were injured, testimony merely as to the value of the animals killed and injured, and failing to show clearly the damages sustained by reason of the injury to those not killed, is too indefinite on which to base a judgment.

Jury—Maps—Papers—Taking to Jury-room.

4. Under Code of Civil Procedure, section 1083, providing that on retiring for deliberation the jury may take with them all papers which have been received in evidence, it was not error, in an action against a railroad company for killing cattle on the track, to refuse to allow the jury to take with them a map of the place where the accident occurred, which was not admitted in evidence, but only used by the witnesses while testifying in explaining their testimony.

Expert Witnesses—Hypothetical Questions—Basis.

5. In asking a hypothetical question of an expert witness, the facts proven must be taken as the basis for the hypothesis.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by S. H. Carman against the Montana Central Railway Company. From a judgment for plaintiff, defendant appeals. **Reversed.**

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Mr. E. L. Bishop, for Appellant.

Messrs. Greene & Cockrill, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal from a judgment. The action was to recover for the alleged negligent killing of some of plaintiff's cattle, and the negligent injury to others. The complaint alleges two separate causes of action: First, on account of negligence in failing to erect and maintain proper fences along its right of way; and, second, on account of negligence in the operation of its trains. An answer and reply were duly filed. The case was then tried before a jury. At the close of the testimony, upon motion of defendant's counsel the court withdrew the first cause of action from the consideration of the jury. A verdict for \$175 was rendered in favor of plaintiff on the second cause of action, and judgment followed. At the close of the evidence, counsel for defendant moved the court to direct a verdict for defendant on the grounds of failure of the evidence to show the negligence alleged and the damages claimed.

The negligence alleged in the second cause of action was that "the said cattle could be seen by the servants of said defendant in charge of said train for a distance of more than three hundred yards—a sufficient distance to have stopped said train, and prevent the same from colliding with or running against or over or upon any of the stock"—but that said defendant's servants in charge of the train neglected to stop it, and allowed it to "run into, against, over, and upon" said cattle, killing three and injuring three of them, to plaintiff's damage in the sum of \$240. The sufficiency of the complaint is not questioned.

This appeal being from the judgment alone, counsel for respondent insists that, under the practice in this state, this court cannot consider the sufficiency of the evidence; that there was testimony introduced by plaintiff tending to sustain the verdict; and that the testimony introduced by defendant tended

to contradict this, and therefore there was a conflict of evidence. Counsel for appellant insist that there is no conflict in the evidence, and that the record contains no substantial evidence to support the verdict. This court has decided in the case of *Ball v. Gussenhoven*, 29 Mont. 322, 74 Pac. 871, that "whether the verdict or decision is unsupported by any substantial evidence, being a question of law, may be reviewed by this court on appeal from the judgment." (See, also, *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.) We may therefore investigate and determine whether the verdict is supported by any substantial evidence.

The train which struck the cattle was going from Cascade to Hardy. About one hundred and forty feet north of the place where the cattle were struck by the train, a point of rocks juts out to within six feet of the track, and the track curves around it. The engineer testified that when he first saw the cattle they were coming up from behind this point of rocks, on the track, about two hundred feet away from the engine; that the train was running between forty-one and forty-two miles per hour, and was equipped with automatic air-brakes, which were in first-class condition; that immediately upon seeing the cattle he made "an emergency application of the brakes" and gave the stock alarm; that he struck the cattle before the train stopped; that he could have done no more to prevent the striking; that he stopped the train within six hundred feet; and that stopping the train inside of a thousand feet was a good stop. This testimony is uncontradicted, and this witness was the only one called who clearly saw the accident. There is no evidence even tending to show that the engineer of the train was not on the lookout. His testimony is uncontradicted that he saw the cattle, about two hundred feet away from the engine, coming up on the track. His testimony is also uncontradicted that he did everything in his power to stop the train before striking the cattle. No negligence of the defendant under any circumstances can be predicated upon this uncontradicted testimony, and the court below should have directed a verdict in its favor.

But again, there is no competent testimony in the record as to the amount of damages sustained by plaintiff. Three animals were killed, and three injured, one of which afterward died. Plaintiff was the only witness upon the question of damages, and he failed to testify directly or clearly as to the amount of his damages. He was not asked as to the amount of his damages, but simply as to the value of the animals killed and injured. He does not give the damages he sustained to the cattle which were injured and not killed, and his testimony as to the value of the cattle killed is also very indefinite, as shown by the following questions and answers: "Q. What would you place the value of those animals— Taking all those that were injured and killed, what would you place the damage at—the value? A. I wouldn't have sold them for near the amount of money I put them in for. Q. Well, \$240? A. I wouldn't taken that for them no day in the week. Q. Well, tell the jury what they were worth, so we can get the testimony. A. They were worth to me probably more than they would be to most anyone else, because I had only a small herd, and I was trying to grade them up to get as good a herd as I could, but I put them in for \$250. Q. Were they reasonably worth that sum? A. They were worth that to me. Q. Were they worth that to anybody? A. Yes; that's my opinion."

Plaintiff's damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages for the cattle injured could not be fixed by the same rule. We do not think this testimony was sufficient to go to the jury at all. The burden was upon plaintiff to show with reasonable certainty what loss he had sustained, and to show that amount as definitely as possible. (*Orient Min. Co. v. Freckleton*, 27 Utah, 125, 74 Pac. 652.) It left the matter of the amount of damages sustained by plaintiff entirely to conjecture by the jury, and no verdict for the amount rendered could be sustained, which had been arrived at upon this testimony. The amount of damages which plaintiff is entitled to recover should not be left to conjecture. (*Shaw v. New Year's Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.)

Another error alleged is the exclusion from evidence and from the jury of a plat or map of the place where the cattle were struck, with the surroundings. It was not offered as original evidence, but only to illustrate the testimony of the witnesses. When it was offered, counsel for defendant stated that it was not made from actual measurements. However, the witness who had it made testified that it was a "fair representation of the course of the Montana Central Railway and of the surroundings a short distance east of Hardy." The objection to its introduction was not because of its being incorrect or inaccurate, but "because it is not shown that the party is competent to draw a map." The court ruled that the plat was not admissible in evidence, but that it might be used to illustrate the testimony of witnesses. After the court had instructed the jury, counsel for defendant asked that the jury might take this map or plat to the jury-room for consideration in making up their verdict. This the court refused to allow, and counsel for defendant excepted. Whether or not this map was admissible in evidence, we need not decide, because it was only offered to be used by the witnesses in explaining their testimony, and the court allowed it to be used for such purpose. There was no error in refusing to allow it to be taken by the jury upon retiring to consider their verdict.

Section 1083 of the Code of Civil Procedure, relied upon by appellant, is as follows: "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person."

The supreme court of California, in construing a statute substantially the same as section 1083, uses the following language: "The statute is not mandatory. It directs the court to allow the jury to take with them any papers received as evidence which may be of service to them in making up their ver-

dict, but none can be taken without permission of the court. The matter is therefore left to the sound discretion of the court, and its action is not revisable unless there has been an abuse of discretion. But the statute only refers to 'papers received as evidence.' Papers receivable as evidence on the trial of a case are public and private writings. These are, when proved primary secondary, or *prima facie* evidence of their contents. Public maps or charts are also, under certain circumstances, made by law *prima facie* evidence of facts of general notoriety and interest (section 1936, Code of Civil Procedure); but a diagram is not a public nor private writing, nor is it made by law primary or secondary or *prima facie* evidence of any fact or object represented by it. When used on the trial of a case it is not used as evidence. It does not prove, nor tend to prove, in the sense of evidence, any fact. It is simply a figure drawn to suggest to the minds of the jurors the relations between objects about which a witness is testifying, and may be drawn on paper or on a stationary blackboard, which cannot be removed. The very construction of the figure itself is defined by the testimony of the witness, and, as illustratory of his testimony, it partakes of it, in the same way that the clearness of the expression of the witness partakes of his evidence. As such it was receivable by the jury, and was in fact taken with them upon their retirement, as much as any other part of the evidence. The bodily presence of the diagram was therefore unnecessary. It would not have made any more intelligible the evidence into which it had entered, and upon which the jury were bound to make up their verdict. The jury themselves saw no necessity for it, for they did not ask for it. Therefore its absence was not prejudicial to the defendant, and could not have influenced their verdict; and that which could not have influenced the verdict will not be used to vitiate it." (*People v. Cochran*, 61 Cal. 548.) Besides, the record does not disclose that the jury expressed any desire to take it. We think the reasoning in the above quotation is conclusive, and therefore hold that the court did not err in its ruling in this regard.

Yet another error is alleged, in the overruling of an objection by defendant's counsel to a hypothetical question asked by plaintiff's counsel of a certain witness. The objection was that the facts stated in the hypothesis had not been proven. It seems too plain to require the citation of authorities that, in a hypothetical question asked of an expert witness, facts proven must be taken as the basis of the hypothesis; otherwise the opinion of the witness given in reply to the question could not possibly have any relevancy to the case being tried.

We advise that the judgment appealed from be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

Reversed and remanded.

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HICKEY ET AL., PLAINTIFFS, A. P. HEINZE, APPELLANT,
v. PARROT SILVER AND COPPER COMPANY
AND THOS. McLAUGHLIN, RECEIVER, RESPONDENTS.

(No. 1,975.)

(Submitted October 22, 1904. Decided March 1, 1905.)

*Receivers—Compensation—Rules for Ascertaining—Expenses
Incurred After Termination of Receivership—Allowance for
Counsel Fees—Parties Liable.*

Receivers—Legally Appointed—Compensation.

1. Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, although the order of appointment be vacated or reversed.

Receivers—Improperly Appointed—Liability for Compensation.

2. Where a receiver is improperly appointed, the party who procured his appointment is liable for his compensation.

Receivers—Reversal of Order Appointing—Consequences—Duties.

3. Whenever the order appointing a receiver is reversed, his authority is taken away, and it then becomes his duty immediately to render his final report and demand his formal discharge.

Receivers—Counsel—Contract of Employment—District Courts.

4. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually

selects his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding upon the court as it is its function to determine both the necessity for counsel and the compensation to be allowed therefor.

Receivers—Compensation—How Determined.

5. In determining the compensation to be allowed a receiver, the circumstances and environments of the particular receivership should be considered.

Receivers—Compensation—Reasonableness.

6. While the receiver is entitled to reasonable compensation for the management of the property, the fact that he is employed by the court, and not by the owner of the property, does not entitle him to any greater compensation than that which would be reasonable if he had been employed by the owner.

Receivers—Compensation—Extra Duties—Giving Bond.

7. Where extra duties are required of a receiver, such as the giving of a bond or the employment of counsel, he is entitled to extra compensation, in addition to that to which he would be entitled merely for the management of the property.

Receivers—Compensation—How Fixed.

8. In fixing the compensation of a receiver, the considerations that should control the court are the value of the property in controversy, the practical benefits derived from the receiver's efforts, the time, labor, and skill needed or expended in the proper performance of his duties, and their fair value, measured by the common business standards, and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted.

Receivers—Compensation—Percentage Basis.

9. *Obiter*: The percentage basis upon which to fix the compensation of a receiver is not always the equitable method.

Receivers—Duties—Books—Vouchers—Examination.

10. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that they may be ready for examination at any time.

Receivers—Counsel Fees—After Reversal of Order—Liability.

11. After an order appointing a receiver had been reversed on appeal, and more than a year after the termination of the receivership, the receiver and the defendant, without the consent of the party who had procured the appointment of the receiver, stipulated that the defendant's objections to the receiver's reports should be referred. *Held*, that the party who procured the appointment of the receiver was not liable for the fees of the attorneys representing the receiver on the reference.

Receivers—Negligence—Costs—Liability for Reimbursement.

12. Where costs have been incurred by the negligence of the receiver, he cannot, in equity, maintain a claim for reimbursement either out of the trust fund or from the party who caused his wrongful appointment.

Receivers—Reversal of Order—Compensation—Attorneys' Fees—Liability.

13. A receiver is not entitled to compensation or allowance for attorneys' fees for any new business transacted after the filing of the *remittitur* reversing the order of his appointment, the expense of the receivership having then terminated, so far as the same could be charged against the trust fund or the person who wrongfully caused the receiver's appointment.

Receivers—Attorneys' Fees—How Fixed—Evidence—Presumptions.

14. Where the court has personal knowledge of the services rendered by attorneys for a receiver, it is not always necessary that it should hear evidence as to the amount which it should allow for attorneys' fees, as the court is presumed to know the value of attorneys' services, but such evidence may be admitted to inform the court what is just and reasonable under the circumstances.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by Michael A. Hickey and others against the Parrot Silver and Copper Company. On motion of plaintiff, Arthur P. Heinze, Thomas McLaughlin was appointed receiver of the property involved in the litigation, and from an order fixing his compensation, and allowing him a certain amount for counsel fees, said Heinze appeals. Reversed.

Messrs. Kirk & Clinton, and Mr. H. L. Maury, for Respondent, Thos. McLaughlin, Receiver.

We take the position that as the receiver was wrongfully appointed upon the application of Arthur P. Heinze, that all the wrongs which flowed from his appointment must necessarily come back to Arthur P. Heinze as costs, the same as costs are taxed against any other unsuccessful litigant in any proceeding which he may institute, and it would be absurd to hold that the receiver after mining and disposing of something like \$400,000 worth of ore, which involved large pay-rolls, large supply accounts consisting of numerous items, that even though the higher court should hold that his appointment was wrongful, that he should not be required to come into court and in a proper manner and in a judicial way settle up his accounts as such receiver. (*Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 967.) The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action. (*State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883; *Hutchinson v. Hampton*, 1 Mont. 39; *Ervin v. Collier*, 2 Mont. 605.)

The complainant, having had no right to the appointment of the receiver, is liable to the defendant for all the consequences of having had one appointed. The costs of the re-

ceivership, including the compensation of the receiver, must be paid by the complainant. (*Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177; *Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 968; *Hutchinson v. Hampdon*, 1 Mont. 39; *Lockhart v. Gee*, 3 Tenn. Ch. 332; *Ervin v. Collier*, 2 Mont. 608.)

When a receiver has been appointed and the order is reversed on appeal, the receiver must turn over the money and property in his charge, and is not entitled to commission or compensation therefrom. (*Pittsfield Nat. Bank v. Bayne et al.*, 140 N. Y. 321, 35 N. E. 630; *Grant v. Los Angeles & P. Ry. Co.*, 116 Cal. 71, 47 Pac. 472, 474.)

The order in the case was reversed. The expenses of the receivership must be paid by the plaintiff when the appointment was wrongfully made. (Beach on Receivers, sec. 119; *Weston v. Watts*, 45 Hun (N. Y.), 219; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788; *St. Louis etc. R. Co. v. Wear*, 135 Mo. 230, 36 S. W. 658; *People v. Jones*, 33 Mich. 303; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *Ogden City v. Bear Lake etc. I. Co.*, 18 Utah, 279, 55 Pac. 385; *Willis v. Sharp*, 58 Hun, 608, 12 N. Y. Supp. 120; *French v. Gifford*, 31 Iowa, 428; *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168.)

Mr. A. J. Shores, Mr. C. F. Kelley, and Messrs. Forbis & Evans, for Respondent, Parrot Silver and Copper Company.

Whatever allowances that have been made or may be made to the receiver in this action are properly taxable to the appellant, Arthur P. Heinze, who procured his appointment. (*Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168; *Willis v. Sharp*, 58 Hun, 608, 12 N. Y. Supp. 120.) Where a receiver has been appointed and the order has been reversed on appeal, the receiver must turn over the money and property in his charge, and is not entitled to commission or compensation therefrom. (*Pittsfield Banks v. Bayne et al.*, 140 N. Y. 321, 35 N. E. 630.)

A receiver is entitled to have his accounts settled and a final order of discharge made. The party against whom the

appointment is made is entitled to make all legal objections to the accounts and to have the said accounts inquired into and settled in the manner prescribed by law, and whatever is done to effect this end is, of course, the natural sequence of the order of appointment.

Mr. John J. McHatton, and *Mr. Jas. M. Denny*, for Appellant.

It was the receiver's duty, not only to the trust, but to the appellant herein, upon whose petition he had been appointed, to have objections to his account disposed of at the earliest date possible, and while all matters to which such objections pertained were fresh and the evidence thereof easy of access, and any neglect so to do by the receiver renders him personally liable for any expenses which may be thus incurred. "If a receiver permits costs to accrue which he ought to have prevented, he will be required to pay such costs out of his own pocket." (High on Receivers, sec. 809.) "Where a receiver has been guilty of negligence or misconduct in the management of property committed to him, the court may reduce his compensation and may in addition impose a penalty in the shape of a further reduction on account of his mismanagement." (Am. & Eng. Ency. of Law, vol. 20, p. 179; Beach on Receivers, 758.) "Upon no principle can it be held that the party who procures his (a receiver's) appointment is by reason thereof responsible for the receiver's conduct or liable for any loss by reason of his misconduct." (Gluck & Becker on Receivers of Corporations, 2d ed., 415; *Kaiser v. Keller*, 21 Iowa, 95; *First Nat. Bank of Jersey City v. Kimball*, 42 N. J. Eq. 107, 6 Atl. 491.)

A counsel fee to be allowed to a receiver must be one rendered for the purpose of preserving the trust estate and beneficial to the trust estate, and not one rendered for the protection of the receiver irrespective and independent of the trust estate. (Gluck & Becker on Receivers of Corporations, 561, 563; *Platt v. Archer*, 13 Blatchf. 351, Fed. Cas. No. 11,214; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573.)

The court having refused to hear and consider evidence as to the professional skill and standing of the attorneys, or rather to permit cross-examination as to such skill and standing, committed reversible error. "The amount of his professional business may be inquired into as tending to show his professional standing." (*Phelps v. Hunt*, 40 Conn. 97.) "Upon a *quantum meruit* for professional services, the professional standing of the attorney is a proper subject of inquiry." (Weeks on Attorneys, 563.) "In all cases the professional skill and standing of the person employed, his experience, the nature of the controversy in regard to the amount involved and character and nature of the question raised in the case, as well as the result, must all be taken into consideration in fixing the value of the services rendered." (*Eggleston v. Boardman*, 27 Mich. 18, 15 Am. Rep. 153; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. (U. S.) 985; Am. & Eng. Ency. of Law, vol. 1, p. 966.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from a final judgment. (*State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613.) It is alleged in the complaint filed in the principal action: That the owners of an undivided thirty-one thirty-sixths of the Nipper lode claim leased their interest to F. Augustus Heinze, who was also given an option to purchase the property. The lessee then sublet the premises to Arthur P. Heinze, who entered into the possession thereof, and at the time the action was commenced, in August, 1899, was working the same. That the Parrot Silver and Copper Mining Company entered the Nipper ground through underground workings, and was extracting and carrying away ores from beneath the surface of the Nipper claim. The complaint asks that the title to the property be quieted, and that the defendant Parrot company be enjoined from entering upon, mining or extracting any ore from, or breaking any rock within or on, the Nipper claim.

The Parrot company, in its answer, admitted that it was extracting ores from a vein beneath the surface of the Nipper

claim, but alleged that such vein had its apex within the Little Mina lode claim, lying north of the Nipper claim, and which was owned by the defendant company. All of the owners of this thirty-one thirty-sixths undivided interest in the Nipper claim, together with the lessee, F. Augustus Heinze, and the sublessee, Arthur P. Heinze, were plaintiffs in this action.

Afterward, about March 3, 1900, the sublessee, Arthur P. Heinze, filed an application for the appointment of a receiver to take possession of and operate that portion of the Nipper claim in dispute; alleging himself to be especially aggrieved, for the reason that his lease thereon expired in July, 1901, and that he desired to have the property operated during the continuance of his lease. A receiver was appointed by order of the court dated May 16, 1900. By the order of appointment the receiver was "authorized to operate and mine said portion of the Nipper lode claim, and all veins and bodies of ore therein, together with all extralateral rights pertaining thereto; to take charge of all ores which may be extracted by him from said portion of the Nipper mining claim; and to have the same removed, reduced, and smelted, so as to realize the most money therefrom," etc. The order of appointment also enjoins the parties, except the cotenants, from interfering with the said receiver in the performance of his duties, and from withholding in any manner the possession of said premises, or any portion thereof, or any of the underground workings thereon or therein, or upon any veins claimed to belong to or within said portion of the said Nipper claim.

The receiver so appointed, it appears, was required to give two bonds—one for \$10,000 and one for \$25,000. The receiver immediately entered into the possession of the property, and began active mining operations about the 1st of June, 1900. Practically all the mining supplies, machinery, tools, and apparatus of all kinds used by the receiver were purchased by him from the Montana Ore Purchasing Company, and all the ores mined were sold to this company. It appears that this company also advanced money to the receiver when needed to settle his monthly accounts.

The defendant Parrot company in the meantime had appealed to the supreme court from the order appointing the receiver, and such order was reversed by the supreme court in March, 1901. (*Hickey et al. v. Parrot Silver and Copper Co.*, 25 Mont. 164, 64 Pac. 330.)

The receiver during his operation of the mine filed his regular monthly statements and reports for all the months except the months of February and March, 1901. To each of these monthly reports the Parrot company filed its objection and protest. The monthly reports of the receiver for the months of February and March, 1901, were not filed until in January, 1902. Objections and protests were filed to these reports by the Parrot company. The receiver had employed an attorney and counselor during his operation of the mine, and had been allowed therefor, but about the time the order appointing the receiver was reversed this counsel ceased to act; and the receiver, after the *remittitur* was filed, employed as his attorneys and counselors, H. L. Maury and Kirk & Clinton. The plaintiff, Arthur P. Heinze, had filed no objections to these monthly statements.

On May 26, 1902, a stipulation was entered into between the receiver and the Parrot company that the taking of the testimony with reference to his various monthly reports should be referred to a referee. This appellant was not a party to this reference. The order of reference was made on that day, and a hearing was had before a referee, which it is claimed by the receiver occupied his time and attention and that of his attorneys for something over three months. Afterward, during the month of December, 1902, the receiver made his final report to the court, asking that he be allowed \$28,000 for his own salary, less \$4,569 which he had already received, and that he be allowed as expenses \$10,000 for his attorney, H. L. Maury, \$10,000 for his attorneys, Kirk & Clinton, and \$125 for his bookkeeper, J. B. McGinn.

There is a statement in the final report of the receiver that the referee to whom was referred the matter of taking testimony and making findings respecting the objections and pro-

tests filed by defendant to the several monthly reports of the receiver had made and filed with the clerk "his findings of fact and conclusions of law, and has recommended that judgment be entered confirming, allowing, and settling as correct each and every of said reports." Reference is also made in the final report to all of the testimony, and to all of the exhibits filed by the referee, "as if all said testimony and exhibits were in this report set out at length and made a part hereof." However, the testimony taken by the referee does not appear in the record, unless it is the same as that given before the court. No separate action appears to have been taken on the report of the referee, and no question respecting the same is involved here, or with reference to the allowance or rejection of the several monthly accounts contained in the monthly reports of the receiver.

To this final report of the receiver objections were filed by all of the plaintiffs, acting jointly, except the sublessee, Arthur P. Heinze, who filed separate, specific objections thereto. Objections and protests were also filed by defendant Parrot company. The objections made to the final report of the receiver by the plaintiffs who filed objections jointly, and by plaintiff, Arthur P. Heinze, who appeared separately in filing objections, are practically the same, and relate to expenses incurred by the receiver for counsel fees and other expenses since the 25th day of March, 1901, at which date the *remittitur* from the supreme court was filed in the district court. Objections were also made to the compensation claimed by the receiver, and it is alleged that the sum of \$500 per month during the ten and one-half months which intervened between the appointment of the receiver and the reversal of the order making such appointment is ample compensation for the receiver. The objections filed by the defendant Parrot company are much more extensive, and cover nearly every phase of the receivership, including practically the same objections made by the plaintiffs, and adding thereto specific objections, to wit, to the sale of property made by the receiver after the reversal of the order appointing him, and the filing of the *remittitur* in the

district court where the order was originally made. The report is further objected to on the ground that the receiver had not properly discharged the duties of his trust, had not fairly accounted for all ores mined, and had not received for such ores their market value when he had disposed of the same, and on many other grounds, making it necessary at the hearing to introduce evidence relating to almost every phase of the work performed during the period the property was in the hands of the receiver.

The hearing on this final report was had in January, 1903, and from the evidence then introduced it appears that after the order appointing the receiver had been reversed, and the remittitur in the case filed in the district court, the receiver had, without any order by the court therefor, sold certain furniture for the sum of \$95, and certain miners' tools and other implements and supplies, receiving therefor \$5,162.28, all of which he had set forth in his final report. It appeared further that his gross receipts during the period of his receivership were \$392,775.43, plus the amount which he had received from the sale of the furniture, mining machinery, and tools as above stated, after the filing of the *remittitur*; that his total disbursements for all purposes were \$408,280, leaving a deficit of \$10,342.29. The propriety of the action of the receiver in selling this furniture, mining implements, supplies, etc., is not questioned by the appellant on this appeal.

On January 17, 1903, the court signed an order overruling all objections to the final report of the receiver, and allowing him \$16,000 for all services performed by him as such; also allowing \$5,000 for legal services performed by H. L. Maury, \$5,000 for legal services performed by Kirk & Clinton, and \$125 for services as bookkeeper by J. B. McGinn. That none of these sums had been paid, except \$4,569 retained by the receiver on account. "That the said report, as to all matters not herein specifically set forth, is adopted and approved by the court." Afterward the receiver filed a motion that an order be made requiring Arthur P. Heinze to pay to the receiver the amount found due, to wit, the sum of \$21,556. This

motion was contested, but was sustained by the court, and on January 31, 1903, the order was entered from which this appeal is taken. It was determined on a former appeal of this case that this order is in effect a final judgment, and is appealable. (*State v. District Court, supra.*)

The objections made by appellant are substantially that the court erred in taxing the expense of the receivership remaining unpaid against the plaintiff, Arthur P. Heinze; that the sums allowed were excessive; that no allowance should be made as compensation to the receiver, or for attorney's fees, or for any services performed after the reversal of the order appointing the receiver.

It will be noticed that the plaintiffs in the principal case did not ask that a receiver be appointed; that subsequent to the commencement of the action this appellant, who is one of the plaintiffs, filed his separate petition asking that a receiver be appointed; that the order of appointment was based upon this petition; that it was afterward determined that this appointment was wrongful.

Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, though the order of appointment be vacated or reversed. (Beach on Receivers, sec. 769.) But to whom should this compensation and expense be assessed? "The compensation of a receiver is taxable costs. (*Hutchinson v. Hampton*, 1 Mont. 39; *Ervin v. Collier*, 2 Mont. 605.) The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in *Hutchinson v. Mampton, supra*, is nevertheless (in absence of exceptional facts) ultimately taxable to the losing party, whose wrong occasioned the appointment, as was declared in *Ervin v. Collier, supra.*" (*State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883.) "The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action [citing cases]. But this does not preclude the court, upon a discharge of the receiver before the conclusion of the action, as was the case here, from fixing his

compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed." (*State ex rel. Heinze v. District Court, supra.*)

In *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168, the court said: "When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment. (*Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 31 Iowa, 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. 604.)" The same doctrine is announced in *Beach on Receivers*, par. 119; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *People v. Jones*, 33 Mich. 303; *Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 967. As was said in *Ogden City v. Bear Lake etc. Irr. Co.*, 18 Utah, 279, 55 Pac. 385: "The expenses incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for it to incur should be charged to the party procuring the order. Such expenses should be regarded as incurred in consequence of an error at his instance. (*Weston v. Watts*, 45 Hun, 219; *City of St. Louis v. Gaslight Co.*, 11 Mo. App. 237; *Bank v. Bayne*, 140 N. Y. 321, 35 N. E. 630; *Moyers v. Coiner*, 22 Fla. 422; *French v. Gifford*, 31 Iowa, 428.)" See, also, *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525.

The order appointing a receiver is the authority under which he acts. Whenever this is reversed his authority is gone, and it then becomes his duty immediately to render his final report and demand his formal discharge.

The receiver is entitled as a matter of right to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding upon the court, for it is the function of the court to determine both

the necessity for counsel, and the compensation to be allowed therefor.

The receiver is entitled to compensation for services performed by him, and the circumstances and environments of the particular receivership are proper to be considered in determining the amount of this compensation. (See, generally, *Forrester et al. v. Boston and Montana Cent. etc. Min. Co. et al.*, 30 Mont. 181, 76 Pac. 2, and cases cited; *McLane v. P. & S. V. R. Co.*, 66 Cal. 606, 6 Pac. 748.)

The receiver in this case was in effect a general superintendent, vested with plenary powers, subordinate only to the will of his master, governed by the rules of law and equity; but the employment came from the court, instead of from the mine owner. Reports were made to the court, not to the owner. The court, not the owner, was the master. The duties and labor performed in such case, whether under an appointment by the court as a receiver, or under an employment by the owner as a superintendent, are the same. The party is required by law in both cases to be loyal to his trust, to exercise the diligence and care of a reasonable person, and to use the skill possessed by him in the conduct of the business with which he is intrusted. If he does all this he has complied with all that is required of him, and he is not personally liable for any resultant loss or damage. The receiver was required to give bonds, but his bondsmen are not liable if he is not. The law does not compel one to accept from the court employment as a receiver, any more than it compels him to accept employment from the owner as a superintendent. If he jeopardizes other interests by accepting the receivership, he does it voluntarily, and is not entitled to be recompensed therefor.

It is well established that the compensation allowed a receiver must be reasonable, but why compensation must be greater, in order to be reasonable, for doing certain work, when the hiring is done by the court, than it would be for the same duties if the hiring were done by an individual, is not apparent. Where extra duties are enjoined, as giving a bond or otherwise, that are not compensated for in some other manner, additional

pay may be allowed; otherwise there is no reason why it should not be the same. And these remarks apply equally to allowances for counsel fees.

The considerations that should be controlling with the court in fixing compensation are the value of the property in controversy; the practical benefits derived from the receiver's efforts and attention; time, labor, and skill needed or expended in the proper performance of the duties imposed, and their fair value, measured by the common business standards; and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted. The percentage basis is not always the equitable method. As was said in *Grant v. Bryant*, 101 Mass. 570, "the court does not regulate the compensation of its officers upon the basis of a fixed commission upon the amount of money passing through their hands, but allows them such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability and competent for such duties and services." (See, also, the following cases: *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283, 25 Atl. 1018; *Boston Safe Deposit etc. Co. v. Chamberlain*, 66 Fed. 847, 14 C. C. A. 363; *French v. Gifford*, 31 Iowa, 428; *Jones v. Keen*, 115 Mass. 170; *Martin v. Martin*, 14 Or. 165, 12 Pac. 234; *United States v. Church etc.*, 6 Utah, 43, 21 Pac. 516; *Sherley v. Mattingly*, 21 Ky. Law Rep. 289, 51 S. W. 189; *Union National Bank v. Mills*, 103 Wis. 39, 79 N. W. 20.)

The order of appointment required the receiver to file his monthly reports on or about the 21st day of each month. Notwithstanding this order, and although the receivership was ended by the reversal of the order of appointment, the receiver delayed filing his reports for the last two months of his operations for more than ten months after the *remittitur* had been filed, and his final report was not filed for some twenty-one months after that date. No reason is given for this extraordinary delay. Objections were made to each monthly report when filed, and no hearing was had. During all this time an attorney was employed, who was paid monthly for his services. More than one year after the termination of the receivership

the receiver and the defendant, without regard to the appellant, entered into a stipulation as follows: "It is hereby stipulated and agreed by and between the attorneys for the defendant (the said defendant being the only party to this suit, objecting to any of the receiver's reports), and the attorneys for the receiver, Tom McLaughlin, that the hearing of the objections to each and all of the receiver's reports heretofore filed in this cause, may be referred by the court to William E. Carrol, Esq., with power in the said William E. Carrol, to hear testimony thereon and to report to the court, findings of fact, conclusions of law, and a judgment on each and every of the said reports, the objections thereto," etc. This stipulation is signed by the attorneys of the defendant and by the attorneys for the receiver. The order of reference was made in accordance with the terms of this stipulation, and a hearing had, this appellant not participating. It is claimed by the receiver that it took him some two or three months to prepare for this hearing. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that they may be ready for examination at any time. If evidence *dehors* the receiver's books and vouchers is necessary to sustain his reports, that evidence certainly would be more easily obtained at the time than after many months of delay. At this hearing the objections made to these reports were not sustained, but the receiver's reports were sustained by the referee.

Where costs have been caused by the negligence of the receiver, he cannot, in equity, maintain a claim for reimbursement either out of the trust fund, or from the party who caused his wrongful appointment.

Whether the defendant in this case is liable for the attorney's fees for this hearing before the referee on the ground that the objections were not sustained, or whether the receiver should bear the expense of his own counsel, are questions not involved here, the only question being, is this appellant liable for these attorney's fees? and the answer, under the facts presented here, is that he is not.

The receiver is not entitled either to compensation or allow-

ances for any new business transacted after the filing of the *remittitur*, for the receivership had been terminated. After that date the receiver had no authority to employ counsel whose compensation could be charged against the trust fund or against this appellant, and neither could the court direct or approve such employment or sanction such payment. When the *remittitur* was filed the expense of this receivership terminated, so far as the same could be a charge against the trust fund or against this appellant.

The allowance of \$125 was "for the services of J. B. McGinn as bookkeeper in the last month, preparing the last two reports, settling up of the accounts, and straightening up the books, and finally closing out the business and accounts." We think this item of expense should be allowed.

The judgment of the court fixing the receiver's compensation and allowing attorney's fees is general; but, from the evidence, it is apparent that it extended this compensation so as to cover time subsequent to the termination of the receivership; that it also allowed attorney's fees for the hearing before the referee on the monthly accounts which should have been settled prior to the order of reversal. This was error, for which the case should be reversed. Evidence relative to the compensation of the receiver and the allowance for counsel fees may be admitted for the purpose of informing the court as to what is just and reasonable under the circumstances; but, where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary that it should hear evidence respecting the amount which it should allow, for a court is presumed to know the value of attorney's services, and it is for its own enlightenment that such evidence is heard.

We think this judgment should be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

Reversed and remanded.

Rehearing denied April 4, 1905.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1905.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, } Associate Justices.
THE HON. WILLIAM L. HOLLOWAY, }

COMMISSIONERS:

HON. JOHN B. CLAYBERG,
HON. HENRY N. BLAKE,
HON. W. H. POORMAN.

BORDEAUX, RESPONDENT, *v.* BORDEAUX, APPELLANT.

(No. 1,787.)

(Submitted May 2, 1904. Decided March 13, 1905.)

Divorce—Suit Money—Counsel Fees—Refusal to Allow—Prejudice—Findings—Implied—Supplemental Transcript—Appeal—Review—Condonation—Evidence.

Divorce—Suit Money—Counsel Fees—Denial—Harmless Error.

1. Defendant in an action for divorce moved, before trial, for suit
(159)

32	159
32	376
32	391
32	159
33	266
32	159
35	160
35	363
36	42
36	56
36	88
36	90

32	159
38	41
38	484
38	555

32	159
39	370
39	494

32	159
41	9
41	453
41	555

32	159
40	351
40	555

money and counsel fees; the application, however, was heard during its progress. No request for continuance was made on any ground. It appeared that she had spent about \$1,000 in preparing the case, and that she owed \$900 of this sum. She was represented by eminent counsel during the entire trial, and the record failed to show that she did not have all the witnesses she desired or all the information concerning plaintiff's witnesses necessary to conduct her defense successfully. *Held*, that under such circumstances, a denial of attorneys' fees and a refusal to allow more than \$200 suit money was not prejudicial error, if error at all.

Implied Findings—Request—Exceptions—Appeal.

2. Under the doctrine of implied findings, a judgment will not be reversed for want of findings, unless the party aggrieved shall have requested them in writing, caused such request to be entered in the minutes of the court, and made and saved exceptions to the action of the court, in accordance with the requirements of section 1114 of the Code of Civil Procedure.

Appeal—Supplemental Transcript—Certificate—Findings.

3. A supplemental transcript containing findings rejected by the trial court, which formed no part of the judgment roll, or of the statement on motion for new trial, or of any bill of exceptions settled by the court, authenticated only by a certificate of the clerk, will be disregarded on appeal.

Divorce—Condonation—Special Defense—Pleadings.

4. While, generally speaking, condonation in an action for divorce is a special defense not available unless pleaded, yet when, though not pleaded, the issue has been contested in the evidence without objection, and it clearly appears that the offense alleged in the complaint has been condoned, the divorce will be denied.

Findings—Supreme Court—Will Make Its Own Conclusions—When.

5. Under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), making it the duty of the supreme court to determine questions of fact, unless for a good reason a new trial or the taking of other evidence in the district court be ordered, the supreme court will hesitate to overturn findings based on substantially conflicting evidence which would justify an inference in favor of either party; but where the conflict is trifling or unsubstantial, or where the evidence preponderates decidedly against the findings, the supreme court may examine the facts, make up its own conclusion, and declare upon the rights involved accordingly.

Divorce—Condonation—Evidence—Sufficiency.

6. In divorce, evidence considered, and *held* sufficient to show that the offense charged in the complaint, if committed, had been condoned.

ON REHEARING. Judgment for plaintiff and order denying new trial reversed. (For former opinion, see 30 Mont. 36.)

Mr. John J. McHatton, Mr. Jesse B. Roote, and Mr. William A. Clark, Jr., for Appellant.

Mr. B. S. Thresher, and Mr. C. F. Kelley, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

It is not necessary to state again the issues presented by the pleadings and tried in the district court. These are stated in full in the former opinion. (30 Mont. 36, 75 Pac. 524.) At the former hearing the respondent was not represented by counsel, nor was a brief filed in his behalf. A rehearing was granted for the reason that the court was in doubt whether its decision in the case was not based upon considerations which were not properly presented by the record. We shall first notice the contentions of the parties as to the correctness of the conclusions stated in the former opinion, and then make further reference to the evidence and to the principles of law which we deem applicable.

1. Suit money and counsel fees: Counsel for respondent contend that the order of August 17, 1901, making the allowance for suit money and denying counsel fees was an appealable order, and as such cannot be reviewed on this appeal, no matter whether or not the court abused its discretion in the premises. It is argued that this position is sustained by the decisions in *In re Finkelstein*, 13 Mont. 425, 34 Pac. 847; *State ex rel. Nixon v. District Court*, 14 Mont. 396, 40 Pac. 66, *Bordeaux v. Bordeaux*, 29 Mont. 478, 75 Pac. 359, *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709, *White v. White*, 86 Cal. 212, 24 Pac. 1030, and the provisions of section 1742 of the Code of Civil Procedure. If the order is appealable under the provisions of section 1722 of the Code of Civil Procedure, as amended by the act of 1899 (Laws 1899, p. 146), then by the provisions of section 1742, *supra*, it may not be reviewed upon appeal from the judgment, it not being an intermediate order within the meaning of that section. (*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.)

In all the cases cited by counsel, except the case of *White v. White*, the particular order complained of was one in effect a final judgment allowing a specific sum for alimony and counsel fees or suit money. It was held that such an order falls

within the statute (section 1722, as amended), because it is a final judgment in the case.

The case of *White v. White* was one in which an application for alimony was denied. The court, without discussion, or giving any reason for its conclusion, held such an order appealable, remarking: "With respect to the right of appeal, there would seem to be no distinction on principle between an order denying and an order granting alimony *pendente lite*." On principle, there seems to us to be a wide distinction; for an order granting alimony finally adjudges that the husband must pay a specific sum of money to his wife or her counsel, and in some cases awards execution for it. The order denying the application merely refuses for the time being to make a requirement to pay, there being nothing in the nature or form of it to give it any of the characteristics of a final judgment. While an appeal does lie from the former, it does not seem to follow, as a matter of course, that such is the case with the latter. The view we have taken of this case, however, renders unnecessary a discussion and determination of this distinction, if it exists, and the rights of the wife in the premises; for, though the order be not appealable, and therefore reviewable on this appeal as affecting the judgment, yet upon the showing presented in the record we do not think this action of the court prejudiced the defendant.

The application for suit money and counsel fees, though made before the trial, was heard during its progress. The trial opened and proceeded to the time of the hearing of the motion without an application for a continuance on the ground that the defendant had no counsel, or on the ground that she was not prepared for trial, or on any other ground. Though the defendant knew perfectly well what her necessities were, she proceeded with the trial, and did not at any time during its progress indicate to the court that she could not proceed without imperiling her rights. At the same time it appears that she was represented by eminent counsel, who do not seem to have relaxed their efforts in her behalf in any degree because their fees were not provided for. Nor is there in the record

any fact supporting the idea that she did not have all the witnesses she desired, or all the information concerning the plaintiff's witnesses necessary to conduct her defense as successfully as she would had an additional allowance been made. Her application shows that she had spent about \$1,100 in investigating the plaintiff's witnesses, and that she owed her agents about \$900 of this sum. It cannot be a ground for reversing the judgment that the court did not grant her, besides the \$200, an additional allowance to pay witness fees and other charges, and to liquidate her liabilities to her agents for the work therefore done by them, when it does not appear that she suffered for the want of any testimony whatsoever. An additional allowance might well have been made upon her showing, and perhaps the court erred in the exercise of its discretion in not making it. It is not apparent, however, that any prejudice was done by the court's action.

2. As to the findings: On motion the court adopted findings 1, 2, 3, 4, 5, 6, and 7 returned by the jury in favor of the plaintiff, and made an additional one as to plaintiff's residence. All the other findings were rejected. The decree was entered in accordance with these findings, and they are sufficient to support it. The defendant requested other findings, but what they were the record does not disclose. There is in the record no bill of exceptions showing that the defendant, at the close of the evidence and argument in the cause, made written request for findings upon the subject of recrimination, or any other issue, and had the request entered in the minutes of the court, nor that any exception was taken to the action of the court in refusing to make the requested findings, as provided in section 1114 of the Code of Civil Procedure. Under these circumstances the judgment may not be reversed because of any defect in the findings, or any failure on the part of the court to make a finding upon any particular issue (Section 1114, *supra*; *Gallagher v. Cornelius et al.*, 23 Mont. 27, 57 Pac. 447; *Haggin v. Saile et al.*, 23 Mont. 375, 59 Pac. 154; *Currie v. Montana Central Ry. Co.*, 24 Mont. 123, 60 Pac. 989), for, under this provision of the statute, every finding necessary to

support the judgment will be presumed, and the failure of the court to make specific findings upon the issues made upon the affirmative matter alleged in the answer is not ground for reversal of the judgment, in the absence of a specific showing by way of bill of exceptions reserved upon the court's ruling, and made a part of the record.

Before the hearing the appellant asked and obtained leave to file a supplemental transcript embodying the findings rejected by the court. This supplement was treated as a part of the record, and the opinion of the court was based in part upon the showing supposed to be made by it. Respondent has called attention to the fact that the matters embodied therein formed no part of the judgment-roll, or of the statement on motion for new trial, or of any bill of exceptions settled by the court, being authenticated only by a certificate of the clerk. For this reason they have on this investigation been excluded from consideration, with the result, already stated, that there is nothing in the record preserved under the requirements of the statute, from which it appears that the court committed error in refusing to make any findings, or in rejecting any of those made by the jury.

3. Condonation: The contention is made that this court was in error in considering the matter of condonation at all, for the reason that, being a special defense, it could not avail the defendant, unless it had been specially pleaded in her answer. Speaking generally, this defense, as a bar to the action, cannot be made of avail by the defendant unless it be alleged in the answer. It is like any other defense in the nature of confession and avoidance, and therefore a special defense—such as payment in actions upon contract for the recovery of money, or of accord and satisfaction, or contributory negligence in actions for personal injuries—of which the plaintiff is entitled to notice. This view is supported by the great weight of authority. (7 Ency. of Pl. & Pr. 92; *Warner v. Warner*, 31 N. J. Eq. 225; *Moore v. Moore*, 41 Mo. App. 176; *Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75; *Clague v. Clague*, 46 Minn. 461, 49 N. W. 198; 14 Cyc. 671; *Hunter v. Hunter*, 132 Cal. 473, 64 Pac. 772; *Pastoret v. Pastoret*, 6 Mass. 276; 2 Bishop

on Marriage and Divorce, 337.) But though this is true, yet, when the issue has been contested in the evidence without objection, as in this case, and it clearly appears that the offense or offenses alleged in the complaint have been condoned, it is clearly the duty of the court to deny relief. An action for divorce is peculiar in its nature, in that, besides the interests of the parties involved, the public is also interested, and for this reason the conscience of the court is appealed to by this interest not to permit the divorce unless the facts presented on the whole record justify it. So that if, upon the whole of the evidence, it appears that the offense alleged in the complaint has been condoned, the divorce should be denied. (2 Bishop on Marriage and Divorce, sec. 231 *et seq.*; *Id.*, sec. 338. See, also, cases cited *supra*.) This being the case, the court has before it interests to be adjudged and determined, separate and distinct from those of the parties, and these may not be ignored or disregarded. If, owing to the peculiar nature of the action and the interests of the public, this duty results, none the less imperative is this duty under the mandate of the statute (section 160, Civil Code), which declares that a divorce must be denied upon a showing of condonation.

It is said, however, that the evidence on the subject of condonation is conflicting, and that for this reason the court, under an unbroken line of its own decisions rendered during the past twenty-six years, is not at liberty to disregard the findings of the district court, express or implied, and make up its own conclusion upon the evidence. This rule has always heretofore been observed by this court, as is evidenced by the decisions referred to, both in equity cases and cases at law. In equity cases, however, the rule has been changed by Act of the legislature, whereby it is made the duty of this court to determine all questions of law and of fact involved, unless for a good reason a new trial or the taking of other evidence in the district court be ordered. (Act of 1903, 2d Extra Session, p. 7.) This statute seems to have been overlooked by counsel. Whether the power conferred by it was already vested in the court without legislative enactment or not we shall not now pause to in-

quire. It is sufficient to say that, in so far as the decisions referred to are concerned, they do not now apply in the strict sense to equity cases, and this court has power, and it is its duty, so far as it may, exercising a due regard for the findings of the district court, based, as they are, upon the testimony of witnesses delivered *ore tenus* in the presence of the court, to reach its own conclusions, and to declare upon the rights involved accordingly. Owing to the advantageous position of the trial court, due to the conditions just adverted to, this court will naturally hesitate to overturn findings based upon substantially conflicting evidence which would justify an inference in favor of either side of the controversy; but where the conflict is trifling or unsubstantial or where the evidence preponderates decidedly against the finding, this court may, looking to the nature of the evidence, proceed to examine it, and make up its own conclusion. Other states have constitutional provisions similar to ours touching the jurisdiction of their appellate courts, and also statutes similar to the Act of 1903, *supra*, and their courts in construing them have announced the rule governing their application substantially as stated above. (*Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4; *Faulkner v. Sims* (Neb.), 94 N. W. 113; *Snyder v. Wright*, 13 Wis. 689; *Fisher v. Farmers' Loan & Trust Co.*, 21 Wis. 74; *Boggess v. Boggess et al.*, 127 Mo. 305, 29 S. W. 1018.)

Remarking upon a similar statute, the supreme court of South Dakota, in *Randall v. Burk Township*, *supra*, said: "This court will not decide the case upon the weight of evidence, as a trial court may do, but will only reverse the decision of the trial court where there is a clear preponderance of evidence against the decision of the court below. The presumption is in favor of the decision of the trial court upon the weight of evidence, which this court will respect; and therefore it is only when this court finds there is a clear preponderance of evidence against such a decision that the presumption above stated will be overcome. It becomes our duty, therefore, not only to determine if there is a substantial conflict in the evidence, but to determine the case upon the weight of evidence, having the above qualification in view."

In *Faulkner v. Sims*, *supra*, the supreme court of Nebraska states the rule thus: "It is a matter of common knowledge that a written record cannot reflect the oral testimony at the trial with absolute accuracy. For these reasons it is eminently proper that findings on conflicting evidence in such cases be adhered to, unless clearly wrong. It must not be forgotten, however, that there are sometimes advantages on the side of the reviewing court. In long and complicated equity cases, especially where an accounting is involved, there is a marked difference between reaching a finding on one's recollection of what he has heard in the course of a trial lasting weeks, or even months, and a finding as a result of patient investigation of a written record, with the aid of printed briefs, where comparisons may be made, computations tested, circumstances weighed, and conflicting statements sifted, upon the certain and assured foundation of a written page. Moreover, the court is instituted to review causes, and the right to resort to it for that purpose is guaranteed by the Constitution. It has no right to renounce its functions. If, giving due weight to every advantage possessed by the trial court in the particular case, it is satisfied that a finding is clearly wrong, it should set such finding aside, notwithstanding there may be some competent evidence in support thereof; otherwise it has not fulfilled its duty of reviewing the finding when properly challenged." The case of *Bogges v. Bogges et al.*, cited, is an application of the same rule, though apparently not founded upon a statute.

The evidence upon which our finding that the adulteries alleged had been condoned is based consists of facts admitted or proved by the plaintiff, and positive evidence introduced by the defendant. In addition to the facts stated briefly in the third paragraph of the former opinion, there is a great deal of other evidence in the record, a reference to which will show that the conclusion stated therein is amply justified.

This action was brought on January 26, 1899. The ground alleged was desertion by the defendant. This pleading was amended on February 25, 1899, when for the first time adultery was charged, but in such general terms that the amended

pleading was properly held demurrable. Then, by another amendment, specific charges were made, giving dates, places, names, etc. Upon the issues made on these specific charges the trial was had. During the trial evidence was introduced tending to show various adulteries committed by the defendant with one Lyman A. Sisley from and after August 6, 1897. Of these, three were found by the court to have been established, to wit, one committed at 825 West Broadway, in the city of Butte, on December 23, 1897; a second committed during the year 1897 at 825 or 827 West Park street; and a third committed in the Weyerhorst Block, in Butte, on November 30, 1896. Witnesses testified to similar acts at various places in the city of Butte during the year 1897, one of which was as early as August 6th. The evidence shows conclusively that the defendant had suspected his wife of infidelity for three or four years, and that during the year 1897 he had employed different persons to obtain conclusive evidence against her. Knowledge was brought home to him of some of the acts charged as early as August 6th. He was informed of subsequent offenses up to and including December 23d, immediately after they are alleged to have been committed. One of these persons employed to secure evidence was his own brother. Yet during all the time that he entertained these suspicions and was having search made for evidence, and after he had obtained knowledge from his witnesses of his wife's adulterous acts, he made no charge against her until a few days before she left his house, but allowed her to remain there and preside at his table. During most of this time he occupied a bed in an adjoining room. Part of the time he occupied the same room and bed; and when she left his house it was at his suggestion, he first saying that she had best go for two or three months, presumably until the scandalous rumors which had started concerning the matter had subsided. Then he urged her to go, but in the meantime cohabited with her just as before. It is true that he denies that he occupied the same bed with her after knowledge was brought home to him, but, in view of the facts already stated, the direct contradictions by the defendant and her uncle, Farlin, and the fact that the plaintiff produced in court the same witnesses who had informed

him of her various acts of infidelity to establish them as grounds for a divorce, without any additional fact or circumstance tending to show that their statements were deemed by him any more worthy of credit at the time the action was brought and at the trial than they were in 1897, we must conclude that he fully condoned her conduct, and cannot now be heard to complain of it; since, so far as this record shows, she has not, since she left his house, nor at any time subsequent to December 23, 1897, been guilty of any similar offense. The authorities cited in the former opinion fully sustain this conclusion upon the facts in this record. According to our view of the principles of law applicable, the issue as to condonation was properly in the case, and the district court must have found upon it in favor of plaintiff. The evidence preponderates so strongly against this finding that we think it should be set aside, and the contrary finding made.

We have, for the purpose of this discussion, assumed that the evidence fully establishes the guilt of the defendant of the acts of adultery found by the court. We do not care to be understood, however, as making this assumption for any other purpose. The evidence in the case is not of a satisfactory character, and we would hesitate to reach the conclusion arrived at by the district court in this record. Indeed, there are many features of the evidence introduced by the plaintiff which justify a very strong suspicion, to say the least, that the charges of adultery are the result of a conspiracy on the part of the plaintiff and some of his witnesses to establish a false charge against the defendant. The conclusion already reached renders it unnecessary to discuss this phase of the evidence. Nor is it necessary to consider and determine the numerous other questions pressed upon our attention. The judgment and order are reversed, and the cause is remanded, with direction to the district court to dismiss the action.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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36	421

RAYMOND, APPELLANT, v. RAYMOND ET AL., RESPONDENTS.

(No. 2,163.)

(Submitted March 7, 1905. Decided March 13, 1905.)

Nonappealable Orders—Statute—Construction.

Nonappealable Orders—Final Judgment—Justices of the Peace.

1. An order of the district court, overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be appealable under Code of Civil Procedure, section 1722, as amended by the Act of 1899 (Session Laws of 1899, p. 146).

Nonappealable Orders—Reviewed—How.

2. If a particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment.

"Final Judgment"—Statutes—Justices of the Peace.

3. The "final judgment" referred to in section 1722 of the Code of Civil Procedure as amended (Session Laws of 1899, p. 146), is a judgment rendered by the district court and not that rendered by a justice of the peace from which an appeal is prosecuted.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by Mary Raymond against Peter Raymond and others. From an order of the district court overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, plaintiff appeals. Dismissed.

Mr. E. A. Carleton, for Appellant.

Mr. C. B. Nolan, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order of the district court of Lewis and Clarke county overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace. Respondents have submitted a motion to dismiss the appeal on the ground that it does not lie. The motion must be granted, because the

order is not among those from which an appeal is allowed under the provisions of section 1722 of the Code of Civil Procedure, as amended by the Act of 1899 (Session Laws of 1899, p. 146).

Appellant has filed a somewhat elaborate brief in opposition to the motion. It is argued by him that the order is a final judgment, and appealable under section 1722, *supra*. The case of *Meyers v. Gregans*, 20 Mont. 450, 52 Pac. 83, is cited. This case is not in point, for the reason that the appeal therein was from a judgment entered on dismissal of an appeal from a judgment of the justice of the peace. This was a final disposition of the case, and hence falls clearly within the purview of the statute. The order in question here is neither in form nor effect a final adjudication of the rights of the parties, but falls under the classification designated as "intermediate orders," which must be reviewed, if at all, on appeal from the final judgment rendered in the case. (Code of Civil Proc., sec. 1742.)

Though the right of appeal in all cases is guaranteed by the Constitution, appeals are nevertheless governed by the regulations and limitations prescribed by law (*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517); and, if the particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment. (*Finlen v. Heinze*, *supra*; sec. 1742, *supra*.)

Counsel for appellant contends that the so-called judgment affirmed in the case of *Meyers v. Gregans*, *supra*, was in fact not a judgment, but merely an order dismissing the appeal, and hence that that case furnishes a precedent that is binding on this court, to the effect that the form of the particular order is of no importance. For the reasons already stated, it is not necessary to discuss this point. We have not examined the record in that case to see what the form of the order really was. The effect of it was a final disposition of the case, and it was, for that reason, wholly different from the one under consideration here.

Counsel also says that the order is a special order, made after final judgment, and for that reason is appealable. By this con-

tention it is evidently meant that, inasmuch as a final judgment has been entered in the case by the justice of the peace, any order thereafter made is a special order after final judgment within the meaning of subdivision 2 of section 1722, *supra*. This contention is wholly without merit. The provision referred to applies only to special orders made after final judgment rendered by the district court. The appeal is dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY CONCUR.

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32	172
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37	111
e37	114
f37	117
38	382

DRISCOLL, APPELLANT, v. CLARK, RESPONDENT.

(No. 2,052.)

(Submitted December 30, 1904. Decided March 13, 1905.)

Negligence—Personal Injuries—Machinery Attractive to Children—“Turntable Doctrine”—Complaint—Sufficiency.

Pleadings—Personal Injuries—Machinery Attractive to Children.

1. In an action for injuries to a child, received while playing around machinery operated by defendant, the complaint must allege either that there was an actual invitation to children to play about the machinery, or that it was so especially and unusually attractive to children that it constituted an implied invitation; and an allegation that defendant knew that the machinery did attract children is insufficient.

Liability of Owner of Property to Trespassers—Negligence.

2. The owner of property is only liable to trespassers for a malicious injury, or one resulting from gross negligence after the peril of the trespassers is known to the owner of the land.

Injuries—Property Owner—Liability.

3. The maxim, “*Sic utere tuo ut alienum non laedas*,” has no application to injuries occurring on one's own premises, but simply to injuries occurring on other lands by the wrongful use of one's own premises.

Legal Duties.

4. The law takes cognizance of legal duties only.

Pleadings—Complaint—Liability of Owners of Property to Trespassers—Insufficiency.

5. (On motion for rehearing.) In an action for injuries to an infant trespassing on defendant's premises, the complaint alleged that for some time immediately preceding the injury the infant, being five years of age, and attracted thereby, had, to defendant's knowledge,

been playing around defendant's machinery, and that, notwithstanding such knowledge, defendant and his agents wholly failed to warn such infant against dangers incident to his so doing, or to request him to cease playing about the machinery, and to leave the premises. *Held*, that defendant not being legally bound to keep a constant lookout to guard persons trespassing on his premises from injury, such allegation was insufficient to show a breach of any legal duty on defendant's part.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Nora Driscoll, as guardian of John Joseph Driscoll, a minor, against William A. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. John Lindsay, and Mr. James H. Baldwin, for Appellant.

The general rule undoubtedly is that one is under no duty to a mere trespasser to keep his premises safe, but there are certain well-defined exceptions to this rule, among which is numbered the doctrine of the "turntable" and similar cases within which the case at bar unquestionably falls. The defendant having seen fit to erect and operate dangerous machinery of such a nature and character that it would constitute an attraction and allurements to the natural instincts of childhood, of which fact he had knowledge, upon an open lot near a public way where he might reasonably have expected children to pass and resort for play, the law imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereby, for a breach of which duty an action will lie if injury and damage result, the maintaining upon one's own property of enticements to the ignorant or unwary being tantamount to an invitation to visit, to inspect and enjoy. (*Edington v. Burlington etc. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561; *Biggs v. Barb-wire Co.*, 60 Kan. 217, 56 Pac. 4; *Kopplekom v. Colorado etc. Co.*, 16 Colo. App. 274, 64 Pac. 1047-1049; *Barrett v. Southern Pac. Co.*, 91 Cal. 295, 302, 25 Am. St. Rep. 186, 27 Pac. 666; *Callahan v. Eel River etc. Co.*, 92 Cal. 89, 91, 28 Pac. 104; *Fink v. City of Des Moines*,

115 Iowa, 641, 89 N. W. 28, 29; *Price v. Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450; *R. R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745-747; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 279, 14 Sup. Ct. 619, 38 L. Ed. 434, 442; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, 900; *Ilwaco Navigation Co. v. Hedrick*, 1 Wash. 467, 22 Am. St. Rep. 169, 25 Pac. 335, 337; *Alabama etc. Co. v. Crocker*, 131 Ala. 584, 31 South. 561, 563; *Keefe v. Railway Co.*, 21 Minn. 207, 211, 18 Am. Rep. 393, 394, *et seq.*; *Power v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154, 155; *Twist v. Winona etc. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, 404; *Cooper v. Overstone*, 102 Tenn. 211, 73 Am. St. Rep. 864, 52 S. W. 183, 45 L. R. A. 591; *Beinhorn v. Griswold*, 27 Mont. 79, 91-93, 94 Am. St. Rep. 818, 69 Pac. 557 (obiter); *Kansas City etc. v. Matson*, 68 Kan. 815, 75 Pac. 503.)

Respondent takes the position that the injured child or his parents have been guilty of contributory negligence. He has thus in effect admitted that there was a duty owed by him to the injured child and that that duty was negligently performed; that injury and damage resulted therefrom and that plaintiff would be entitled to recover were it not that the alleged negligence of the injured child or his parents barred the right. But these questions cannot properly be determined by the court as the matter is now presented. The question of negligence is a question of fact to be determined by the jury. (*Wastl v. Montana etc. Ry. Co.*, 24 Mont. 159, 171, 61 Pac. 9; *Wall v. Helena etc. Ry. Co.*, 12 Mont. 61, 29 Pac. 721; *Prosser v. Montana Cent. Ry. Co.*, 17 Mont. 372, 378, 43 Pac. 81; *Johnson v. B. & M. Min. Co.*, 16 Mont. 164, 176, 40 Pac. 298; *Merrifield v. M. G. Q. Min. Co.*, 143 Cal. 54, 76 Pac. 710, 711; *Allen v. N. P. Ry. Co.*, 35 Wash. 221, 77 Pac. 264, 265; *Brinkmeir v. Missouri Pac. Ry. Co.* (Kan.), 77 Pac. 586, 587; *Hone v. Mammoth Mfg. Co.*, 27 Utah, 168, 75 Pac. 381, 383; *Kansas City etc. Co. v. Matson*, 68 Kan. 815, 75 Pac. 503; *Fox v. O. C. S. R.*, 118 Cal. 55, 62, 62 Am. St. Rep. 216, 50 Pac. 25; *Barrett v. S. P. R. Co.*, 91 Cal. 296, 302, 25 Am. St. Rep. 186,

27 Pac. 666.) So is the question of contributory negligence. (*Pueblo etc. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322, 324; *Hone v. Mammoth Mfg. Co.*, 27 Utah, 168, 75 Pac. 381, 383; *Wastl v. M. U. Ry. Co.*, 24 Mont. 159, 171, 61 Pac. 9; *Wall v. Helena etc. Co.*, 12 Mont. 61, 29 Pac. 721; *Prosser v. M. C. Ry. Co.*, 17 Mont. 272, 278, 43 Pac. 81; *Criswell v. Montana Cent. Ry. Co.*, 17 Mont. 189, 212; *Ilwaco Ry. Co. v. Hedrick*, 1 Wash. 467, 22 Am. St. Rep. 169, 25 Pac. 335, 336; *Merrifield v. M. G. Q. M. Co.*, 143 Cal. 542, 76 Pac. 710; *Missouri Pac. Ry. Co. v. Johnson* (Kan.), 77 Pac. 577, 578; Code of Civil Proc., sec. 3440.) In determining such questions, all of the peculiar circumstances of each case must be taken into consideration. (*Chicago etc. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997, 999; *Edgington v. Burlington etc. R. Co.*, 116 Iowa, 410, 90 N. W. 95, 100; *Merrifield v. M. G. Q. M. Co.*, 143 Cal. 54, 76 Pac. 710; *Moynihan v. Whidden*, 143 Mass. 287, 9 N. E. 646.)

Contributory negligence is a matter of defense and it must be alleged and proved as such. (*Meisner v. City of Dillon*, 29 Mont. 116, 124, 74 Pac. 130; *Mulville v. Pacific Mut. Ins. Co.*, 19 Mont. 95, 100, 47 Pac. 650; *Ball v. Gussenhoven*, 29 Mont. 322, 329, 74 Pac. 871; *Cummings v. H. & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *Hunter v. M. C. Ry. Co.*, 22 Mont. 525, 533, 534, 57 Pac. 140; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Wall v. Railway Co.*, 12 Mont. 44, 29 Pac. 44; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.) It follows that respondent's position cannot be maintained, and especially in view of the facts: 1. That in law children of tender years are deemed incapable of contributory negligence. (*Merrifield v. M. G. Q. M. Co.*, 143 Cal. 54, 76 Pac. 710; *Mitchel v. Tacoma etc. Co.*, 13 Wash. 560, 43 Pac. 528, 529; *Ollis v. Houston etc. Ry. Co.*, 31 Tex. Civ. App. 601, 73 S. W. 30; *Harper v. Kopp*, 24 Ky. Law Rep. 2342, 73 S. W. 1127; *Consolidated etc. Ry. Co. v. Wyatt*, 59 Kan. 772, 52 Pac. 98; *Pueblo Electric etc. Ry. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322, 323; *Eskildron v. City of Seattle*, 29 Wash. 583, 70 Pac. 64; *Illinois etc. R. R. Co. v. Jernigan*,

198 Ill. 297, 65 N. E. 88; *True etc. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *Edgington v. Burlington etc. R. Co.*, 116 Iowa, 410, 90 N. W. 95, 96; *Brown v. Shellenberg*, 19 Pa. Sup. Ct. 286; *Fink v. City of Des Moines*, 115 Iowa, 641, 89 N. W. 28; *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34; *Rice v. Crescent Ry. Co.*, 51 La. Ann. 108, 24 South. 791; *Walbridge v. Schuylkill etc. Co.*, 190 Pa. St. 274, 42 Atl. 689; *Keller v. Gaskill*, 20 Ind. App. 502, 50 N. E. 363; *Washington etc. Co. v. Gladnon*, 15 Wall. 408; *Tully v. Philadelphia etc. Co.*, 3 Pen. (Del.) 455, 50 Atl. 95.) 2. That the law does not impute the negligence of parents to children when the suit is brought for the benefit of the child. (*Roth v. Union etc. Co.*, 13 Wash. 525, 43 Pac. 641, 647, 44 Pac. 253; *Eskildron v. City of Seattle*, 29 Wash. 583, 70 Pac. 64; *Berry v. Lake Erie etc. Co.*, 70 Fed. 679; *Atchinson etc. Co. v. McFarland*, 2 Kan. App. 662, 43 Pac. 788; *Texas etc. Co. v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518; *Fink v. City of Des Moines*, 115 Iowa, 641, 89 N. W. 28, 29; *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34; *Kay v. Pennsylvania Ry. Co.*, 65 Pa. St. 269, 3 Am. Rep. 628, 635; *Ploof v. Burlington etc. Co.*, 70 Vt. 509, 43 L. R. A. 108, 41 Atl. 1017; *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 218, 41 L. R. A. 728, 47 N. E. 634, 51 N. E. 88; *Missouri etc. Ry. Co. v. Shockman*, 59 Kan. 774, 52 Pac. 446; *Edgington v. Burlington etc. Co.*, 116 Iowa, 410, 90 N. W. 95, 98; *Kowalski v. Chicago etc. Co.*, 84 Fed. 586; *Westbrook v. Mobile etc. Co.*, 66 Miss. 560, 14 Am. St. Rep. 587, 589, 6 South. 321.) The rule being that though the negligence of a third person, not subject to plaintiff's control or direction, is in part responsible for the injury, respondent's liability is not destroyed. (*Barrett v. Southern Pac. Co.*, 91 Cal. 296, 303, 25 Am. St. Rep. 186, 27 Pac. 666; *Freeman v. Sand Coulee Co.*, 25 Mont. 194, 64 Pac. 347; *Callahan v. Eel R. Co.*, 92 Cal. 89, 92, 28 Pac. 104; *Choctaw etc. Co. v. Holloway*, 114 Fed. 458; *St. Louis Stockyards v. Godfrey*, 198 Ill. 288, 65 N. E. 90; *Logansport etc. Co. v. Coate*, 29 Ind. App. 299, 64 N. E. 638, 640; *Kansas City etc. Co. v. Matson*, 68 Kan. 815, 75 Pac. 503.)

Mr. W. M. Bickford, and *Mr. W. A. Clark, Jr.*, for Respondent.

The general rule of law is that a trespasser cannot recover damages from the owner of the premises, no matter how negligent the owner may have been with reference to the condition of the premises. To this general rule the courts have made an exception in what is known as the "turntable cases," and this exception is based upon the theory that where the owner of premises maintains thereon machinery which is naturally attractive to children, and which is likely to result in their injury, in such cases it is the duty of the owner of the ground or land or premises to guard against anticipated injuries to those who are likely to be injured thereby because of their lack of judgment, or lack of knowledge of the dangerous character of such attractive machinery. (Watson on Damage for Personal Injuries, p. 296, sec. 235.)

The general rule of law is that the owner of premises owes no duty to trespassers except the duty of not wantonly or willfully inflicting injuries upon those coming upon them. (Black's Law and Practice in Accident Cases, p. 89, sec. 81; Central Law Journal, vol. 44, p. 302, and cases cited; *Chicago etc. Ry. Co. v. Smith*, 46 Mich. 504, 9 N. W. 830; *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107, 19 Am. St. Rep. 591, and note on page 593, 19 Atl. 27; *Matson v. Port Townsend Southern R. R. Co.*, 9 Wash. 449, 37 Pac. 705, decided August 4, 1894; *Shea v. Gurney*, 163 Mass. 184, 47 Am. St. Rep. 446, 39 N. E. 996; *McGuinness v. Butler*, 159 Mass. 233, 38 Am. St. Rep. 412, 34 N. E. 259.) In *Rodgers v. Lees*, 140 Pa. St. 475, 23 Am. St. Rep. 250, 21 Atl. 399, the court says: "And in a case where an infant had sufficient capacity to know the distinction between good and evil, he would be responsible for his conduct." (*Rhodes v. Georgia R. R. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922; *Westbrook v. Mobile etc. Ry. Co.*, 66 Miss. 560, 14 Am. St. Rep. 590, 6 South. 321.) A trespassing child cannot recover damages. (*Mergenthaler v. Kirby*, 79 Md. 182, 47 Am. St. Rep. 371, 28 Atl. 1065.) And the owner of land is not required to provide against remote and

improbable injuries to children trespassing thereon. (*Brinkley Car Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154. See, also, *Maenner v. Carroll*, 46 Md. 218; *Billingslea v. Smith*, 77 Md. 535, 39 Am. St. Rep. 436, 26 Atl. 1077.)

In *Witte v. Stifel*, 47 Am. St. Rep. 673, the authorities upon the question of injury to child trespassing on premises of another are summarized. (See, also, *Gillespie v. McGowan*, 100 Pa. St. 149, 45 Am. Rep. 365; *B. & O. R. R. Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706; *Cauley v. Pittsburg etc. R. R. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664.)

There seems to be a marked disposition upon the part of the later authorities to disregard the principle announced in the "turntable cases," and to get away as far as possible from those decisions. There has been no extension of the rule, but a marked disposition upon the part of the courts to restrict its operation, and to refrain from extending it. All of the later cases, except in states where the rule announced in the "turntable cases" has been adopted, have distinctly and emphatically denied the justice of the holding, and have adopted the general principle that the owner is not liable to a trespasser. (Note to *Barney v. Hannibal etc. R. Co.*, 26 L. R. A. 847, and cases cited.) To show that the principle announced in the cases above cited apply with equal force to children of tender years as to those *sui juris*, we call the court's attention to the cases of *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 810; *Smith v. J. Dold Packing Co.*, 82 Mo. App. 9; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *Savannah etc. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 649.

The duty of caring for children, protecting them, and preventing injuries from happening to them, devolves, not upon the proprietor or owner of land or dangerous machinery, but primarily devolves upon the parent or guardian, and the negligence of the parent or guardian, or other person, having the child in charge, especially if the child is *non sui juris*, rests upon the parent or guardian. The leading case upon this ques-

tion is that of *Lynch v. Mordin*, 1 Q. B. 29, and has been generally followed in this country. (*Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Daley v. Norwich and Worcester*, 26 Conn. 591, 68 Am. Dec. 413; *Rauch v. Lloyd*, 31 Pa. St. 358, 72 Am. Dec. 747; *Holly v. Boston Gaslight Co.*, 8 Gray, 129, 69 Am. Dec. 233; *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Lehman v. Brooklyn*, 29 Barb. 233; *Wright v. Malden etc. R. R. Co.*, 86 Mass. 283; *Lafayette etc. Ry. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318; *Wendall et al. v. New York etc. R. R. Co.*, 91 N. Y. 420; *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 275.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal from a judgment. The action was brought to recover damages for a personal injury to plaintiff's ward, arising from the alleged negligence of defendant in maintaining and operating what is claimed to be dangerous machinery upon his own premises.

The complaint, after preliminary allegations of the appointment of a guardian, alleges, in substance: That on or about June 5, 1903, the time of the injury, and for a long time prior thereto, the defendant carelessly and negligently and in disregard of duty had in *use and operation*, and *used and operated*, on the Steward lode claim, and within ten feet of North Main street, certain dangerous machinery and apparatus consisting of an endless chain, to which there was attached large and sharp flanges or projections, for the purpose of transporting lumber to and from his mill, which endless chain was on June 5, 1903, and had been, operated and kept in rapid motion, and was wholly unguarded, unprotected, and uninclosed, notwithstanding the defendant "had been fully aware that said machinery and apparatus was of such a nature and character that children would be and were attracted thereby, and had been and were in the habit of congregating around and playing about the same." That on June 5th, and for some time prior thereto, John Joseph Driscoll, a minor, then five years old, "being attracted thereby,

had," to the knowledge of defendant and his agents, then and there in the management and control and engaged in the operation of said machinery and apparatus, "been playing around and about the same, and that, notwithstanding said knowledge of the said defendant and his said agents, they, though fully aware of the danger in which said minor then was, wholly failed and neglected to exercise that degree of care and caution to avoid injuring said minor which a reasonable man would have exercised under like circumstances, in this, that they and each of them wholly failed and neglected to warn said minor against the dangers incident to his playing around and about the said machinery and apparatus, and wholly failed and neglected to request said minor to cease playing around and about the same, or to leave the immediate vicinity thereof, or in any wise take any steps to prevent injury to the said minor by reason of the use and operation of said machinery and apparatus by said defendant and his agents; and said * * * minor became fastened upon said flanges or projections upon said endless chain, and was drawn thereby and while said machinery and apparatus was in rapid motion and operation, upon and toward other machinery used by said defendant in connection with said endless chain, and by said machinery and apparatus and the operation thereof by the said defendant as aforesaid" was injured. The remainder of the complaint simply alleges the directions of the probate court to the guardian to institute this suit. To this complaint a demurrer was interposed on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declined to amend. Judgment was rendered and entered in favor of defendant.

It is evident that counsel for plaintiff endeavored to frame a complaint which would bring the case within the doctrine of the "turntable cases," so called, and cases similar in character. His entire argument and brief on appeal seem to have been made to sustain the complaint under that doctrine. The doctrine of the "turntable cases," so called, was first announced in this country in the case of *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and has been followed by some courts of

last resort. There seems, however, to be a growing tendency in the later cases to strictly limit the doctrine to cases falling within the facts disclosed by *Railroad Co. v. Stout*, or to renounce the doctrine altogether. The principle underlying this doctrine is well illustrated by the case of *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393, in which the court says: "The complaint states that the defendant knew that the turntable, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and, when put in motion by them, dangerous, to young children; and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger." This case, as well as that of *Railroad Co. v. Stout*, *supra*, are referred to with approval in the case of *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. An examination of the cases cited by appellant discloses that the dangerous machinery or other thing on defendant's premises was alleged to and did attract and allure children of tender years, and that defendant knew or was charged with the knowledge of that fact, and further knew that children frequented the place to play because of such allurement and attractiveness. The courts held that such facts amounted to an invitation to children to come upon the premises, and excused the technical trespass.

Under this doctrine, which is an exception to the common law, it must therefore clearly appear from the complaint that such invitation, either express or implied, exists. Indeed, the whole doctrine rests upon the existence of such invitation, either express or implied, from the maintenance of dangerous machinery on the premises which is so especially and unusually alluring to children of tender years that they are attracted thereby, to the knowledge of defendant. From these facts the courts hold that a duty is charged upon defendant to keep this

machinery safe from injury to children. This is illustrated by the case of *San Antonio etc. Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28. The complaint was quite voluminous. It alleged that the machinery (turntable) was dangerous, and "was calculated to attract, and did attract, the attention of children of tender years, who would be enticed thereto for amusement and pleasure." It also alleged "that the defendant, through its proper officers, agents and servants, was fully aware of the dangerous character of said machine, and well knew the peril and danger to which the children who lived in Alice would be exposed by leaving the same unguarded and unfastened." The complaint then goes on to show how the accident occurred, and the damages. The court, in its opinion, discusses the question of negligence in such cases, and what allegations of duty are required, in the following language: "The law imposes upon the carrier certain duties toward his passenger, upon an employer certain duties toward his employee, and upon a person traveling a public street or highway certain duties toward others thereon, for the reason that these various relations of persons to each other are lawful. Hence, when facts are alleged showing the particular relation, the duty follows as a matter of law. When, however, one enters upon the private property of another, his relation to that property and the owner thereof is not *prima facie* lawful, and therefore the law does not merely, by reason of his presence thereon, impose upon the owner any duty of care for his protection, although his wrongful presence does not relieve the owner of the general duty imposed upon him by law, as a member of society, not to intentionally injure another. In such a case, to state a cause of action against the owner for damages for an injury inflicted upon him while thereon, the petition need only show a violation of such general duty, or, in other words, an intentional injury. Such intent can be established either by direct evidence or by circumstances showing such a reckless disregard of the lives and safety of others as to estop the owner from denying the intent. As illustrating, if not fully supporting, this principle, see *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, as explained in *Gillespie*

v. *McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Schmidt v. Dist. Co.*, 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Harriman v. Railway Co.*, 45 Ohio St. 12, 4 Am. St. Rep. 507, 12 N. E. 451; *Dunham v. Pitkin*, 53 Mich. 507, 19 N. W. 166; *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. Rep. 211, 25 N. E. 156, 9 L. R. A. 313.

"If, however, the person entering upon the private property of another does so by invitation of the owner, a lawful relation is thereby established, and the law imposes upon the owner a duty of care for his safety, the degree of which we need not consider here. Such invitation may be express or implied. Where it is claimed to have been express, it is a mere question of fact as to whether it was extended, and no legal difficulty exists. Where, however, it is sought to establish the fact of invitation from circumstances, the greatest difficulty arises in determining the character of circumstances from which the fact of invitation can be inferred. This is especially true where, as in the case before us, the invitation is sought to be established by estoppel against what was in all probability the true intent of the owner.

"It has been contended broadly that when an owner places or permits anything upon his property which is attractive to others, and one is thereby induced to go thereon, the invitation may be inferred as a fact by the court or jury. Now, since it is manifest that to some classes of persons, such as infants, the things ordinarily in existence and use throughout the country, such as rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks, etc., are both attractive and dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon the owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore, it has been generally held that the invitation cannot be inferred in such cases. These cases rest upon the sound principle that, where the owner makes such use of his property as others or-

dinarily do throughout the country, there is not, in legal contemplation, any evidence from which a court or jury may find that he had invited the party injured thereon, though it be conceded that his property or something thereon was calculated to and did attract him. (*Missouri etc. Ry. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573, and cases cited therein; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598; *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059.) Where, however, the owner maintains upon his premises something which, on account of its nature and surroundings, is especially and unusually calculated to attract, and does attract, another, the court or jury may infer that he so intended, and hence invited him."

The court concludes the opinion as follows: "In so far as the turntable cases and other cases involving injuries upon dangerous machinery or private property may be considered to lay down the broad proposition that the owner can be held liable without proof of either an intent to injure or an invitation, as these have been above explained, we do not think them based upon sound principle. We do not think the petition in this case shows an invitation, in that it neither alleges such fact, nor that the turntable was unusually attractive; nor does it allege that there was any intent to injure, within the meaning of the principles above discussed. We think the fact of invitation, or the fact of an intent to injure, as the case may be, are issuable ones to be found, and probably should be alleged specifically, or at least such facts should be stated as to make it clear that such issue or issues are presented to be passed upon. The cases of 9 East, *supra*, and *Corby v. Hill*, 4 Com. B., N. S., 556, seem to recognize that these issues must be presented by the pleadings, and we think this is peculiarly the case under our system, which requires a statement of the facts constituting the cause of action or defense." We are satisfied that this case correctly announces the law as to what should be stated in the complaint under the turntable doctrine.

The case of *San Antonio etc. Ry. Co. v. Morgan*, 24 Tex. Civ. App. 58, 58 S. W. 544, sets forth a complaint for the same accident as in the above case, which is held to be sufficient. By a comparison of that complaint with the one at bar, one can readily distinguish the deficiencies of the latter.

In this complaint there is no direct allegation that the machinery was so *especially* and *unusually* alluring to children as to attract them, but only that defendant knew that it did attract them. True, it is alleged that the machinery was dangerous, but no facts are alleged from which the dangerous character of the machinery can be inferred. Conditions may exist under which the most simple machinery or implements may be dangerous. A rake or a hoe would be dangerous if left with the teeth or blade turned up, on premises frequented by children, but would not be dangerous to a child if he did not touch it. There is no allegation that this machinery was inherently dangerous any more than a rake or a hoe, no express allegation of invitation to children to come upon the premises, and no facts are alleged under the above authority from which such invitation could be implied. The child was therefore, under the allegations of the complaint, a mere trespasser upon defendant's property, and the defendant was charged with no greater duty toward him than toward trespassers generally. The rule is well settled that the owner of property is only liable to trespassers for a malicious injury, or one resulting from gross negligence after the peril of the trespassers is known to the owner of the land. (*Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Beinhorn v. Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 69 Pac. 557, 59 L. R. A. 771; *Carman v. Montana Cent. Ry. Co.*, 32 Mont. 137, 79 Pac. 690.)

But again, there is no allegation but that this machinery was proper, necessary, and convenient for the use intended in the business of defendant, and that he was conducting a legal business in a lawful way. It is a principle as old as the law itself that one may conduct his business on his own premises with machinery reasonably necessary and convenient to make the busi-

ness successful. The maxim, "*Sic utere tuo ut alienum non laedas*," is also recognized, but has no application to injuries occurring on one's own premises, but simply to injuries occurring on other lands by the wrongful use of one's own premises. (*Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911.) Under the allegations of this complaint, the minor being a trespasser upon defendant's land, the only duty owing to him was not to injure him wantonly or willfully after the defendant or his employees were aware of his peril. There is no allegation of wanton or willful injury, and no sufficient allegation of gross negligence.

The writer of this opinion does not hesitate to say that, in his judgment, the doctrine of the "turntable cases" is against the weight of authority, and cannot be sustained upon principle or reason. See the following cases: *Delaware etc. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 831; *Turess v. New York etc. R.*, 61 N. J. L. 314, 40 Atl. 614; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724; *Daniels v. New York etc. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, 13 L. R. A. 248; *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, 55 L. R. A. 310; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133. We need not, however, hold on this appeal that such doctrine is incorrect, for two reasons: First, the complaint is insufficient even under that doctrine; and, second, the case is plainly distinguishable from those holding that doctrine.

So far as appears from the complaint, the defendant was engaged in conducting a legal business in a lawful way, with machinery reasonably convenient and necessary to the success of such business on his own land, and not dangerous in itself. It

probably was farthest from the intention of defendant or of his employees to injure the child. As well said by the court in the case of *Buch v. Amory Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809: "The defendants' machinery was in perfect order and properly managed. They were conducting their lawful business in a lawful way, and in the usual and ordinary manner. During the plaintiff's presence they made no change in the operation of their works or in their method of doing business. No immediate or active intervention on their part caused the injury. It resulted from the joint operation of the plaintiff's conduct and the ordinary and usual condition of the premises. Under these circumstances an adult in full possession of his faculties, or an infant capable of exercising the measure of care necessary to protect himself from the dangers of the situation, whether he was on the premises by permission or as a trespasser, could not recover. The plaintiff was an infant of eight years. The particular circumstances of the accident—how or in what manner it happened that the plaintiff caught his hand in the gearing—are not disclosed by the case. It does not appear that any evidence was offered tending to show that he was incapable of knowing the danger from putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger. Such an incapacity cannot be presumed. [Citing cases.]" As a rule, a child is enticed or allured by dangerous machinery or dangerous places to play with or about them. Play, and not the gratification of curiosity, is usually the goal of all childish instincts and impulses. Its curiosity is usually very easily satisfied, and experience has taught us that a child's curiosity for anything with which he cannot play ceases when he becomes accustomed to and familiar with it.

In this case it is alleged that the dangerous machinery was in operation at the time of the injury, and had been so in operation for a long time prior thereto. In so far as the complaint is concerned, this machinery may have been operated for so long a time in sight of the child that it had become

familiar with it, and that its curiosity had been satisfied. It is impossible that the child was allured, attracted, or enticed to come upon defendant's premises for the purpose of playing with or upon this machinery. There is always danger for a child to play with or touch moving machinery, and the degrees of danger are immaterial.

The following cases fully support the proposition that this case is distinguishable from the "turntable cases," and that no liability is charged against defendant in the complaint: *Buch v. Amory Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *Savannah etc. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133; *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364, 46 N. E. 115, 36 L. R. A. 493; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, and note; *Erickson v. Great Northern Ry. Co.*, 82 Minn. 60, 83 Am. St. Rep. 410, 84 N. W. 462, 51 L. R. A. 645; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Barney v. Hannibal etc. R. Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; *Rodgers v. Lees*, 140 Pa. St. 475, 23 Am. St. Rep. 250, 12 L. R. A. 216, 21 Atl. 399.

Plaintiff seeks to avoid the effect of the decision of this court in *Egan v. Montana Cent. Ry. Co.*, *supra*, by attempting to allege want of ordinary care by defendant, in that he failed and neglected to warn said minor of the dangers incident to his playing about the machine, or to request him to cease playing about it and to leave the premises. Actionable negligence is a breach of a legal duty. The complaint must show that defendant owed the child a legal duty which he neglected to perform. There may have been a moral duty which he neg-

lected to perform, but the law takes no cognizance of any duties other than legal ones.

Quoting again from *Buch v. Amory, supra*: "What duties do the owners owe to a trespasser upon their premises? They may eject him, using such force, and such only, as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence, bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Redigan v. Railroad*, 155 Mass. 44, 47, 48, 31 Am. St. Rep. 520, 28 N. E. 1133, 14 L. R. A. 276), or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them, for any injury that he may receive. On the contrary, he is liable to them for any damage that he, by his unlawful meddling, may cause them or their property. What greater or other legal obligation was cast on these defendants by the circumstance that the plaintiff was (as is assumed) an irresponsible infant? If land owners are not bound to warn an adult trespasser of hidden dangers—dangers which he, by ordinary care, cannot discover, and therefore cannot avoid—on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which by no degree of care he can discover, and that of the infant incapable of comprehending danger, is, in a legal aspect, exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other.

"There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neigh-

bor and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger, and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight year old boy beginning to climb into his garden over a wall stuck with spikes, and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? (*Degg v. Railway*, 1 Hurl. & N. 773, 777.) I see my neighbor's two year old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (Pub. St., c. 278, sec. 8), because the child and I are strangers, and I am under no legal duty to protect him. Now, suppose I see the same child trespassing in my own yard, and meddling in like manner with the dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant, by coming unlawfully upon my premises, impose upon me the legal duty of a guardian? None has been suggested, and we know of none. An infant, no matter of how tender years, is liable in law for his trespasses. [Citing cases.] If, then, the defendants' machinery was injured by the plaintiff's act in putting his hand in the gear-

ing, he is liable to them for the damages in an action of trespass, and to nominal damages for the wrongful entry. It would be no answer to such an action that the defendants might, by force, have prevented the trespass. It is impossible to hold that, while the plaintiff is liable to the defendants in trespass, they are liable to him in case for neglecting to prevent the act which caused the injury both to him and them. Cases of enticement, allurements, or invitation of infants to their injury, or setting traps for them, and cases relating to the sufficiency of public ways, or to the exposure upon them of machinery attractive and dangerous to children, have no application here."

We adopt the reasoning set forth in this opinion and the conclusions therein announced, and therefore are of the opinion that there is no sufficient allegation of gross negligence in the complaint upon which defendant can be held liable.

We advise that the judgment be affirmed.

PER CURIAM.—The judgment is affirmed.

MR. CHIEF JUSTICE BRANTLY: I think the judgment should be affirmed for the reasons stated in the foregoing opinion.

MR. JUSTICE MILBURN: I concur in the result reached; that is to say, that the judgment should be affirmed. The complaint does not state a cause of action, and this is apparent for the reasons stated. I do not agree with all that is said in the opinion as to absence of legal duty to a trespasser. I do not believe that the turntable doctrine is wrong.

MR. JUSTICE HOLLOWAY: I agree with the result reached—that the complaint does not state facts sufficient to constitute a cause of action under the authority of *San Antonio etc. Ry. Co. v. Morgan*, referred to in the opinion. I do not agree with much that is said in the opinion, particularly with reference to the soundness of the doctrine announced in the so-called "turntable cases," or the applicability of that doctrine to a case of the character of the one now under consideration.

ON MOTION FOR REHEARING.

(Submitted April 10, 1905. Decided April 11, 1905.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In their petition for a rehearing herein counsel for plaintiff contend that, though it be conceded that the complaint does not state a cause of action within the rule of the "turntable cases," yet that its allegations bring it clearly within the rule laid down by this court in *Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. 831, the applicability of which, it is alleged, this court evidently overlooked. The statement in the opinion in that case upon which they rely is the following: "The defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act occasioning injury, and the duty of exercising reasonable care to avoid injuring him after becoming aware of his presence on the right of way." The particular allegation of the complaint which they say brings this case within the purview of that statement is "that on the said 5th day of June, A. D. 1903, and for some time immediately preceding the said injury, the said John Joseph Driscoll, a minor, being five years of age, being attracted thereby, had, to the knowledge of the said defendant and his agents, then and therein the management and control and engaged in the operation of the said machinery and apparatus, been playing around and about the same, and that, notwithstanding the said knowledge of the said defendant and his said agents, they, though fully aware of the danger in which the said minor then was, wholly failed and neglected to exercise that degree of care and caution to avoid injuring said minor which a reasonable man would have exercised under like circumstances, in this: that they and each of them wholly failed and neglected to warn the said minor against the dangers incident to his playing around and about the said machinery and apparatus, and wholly failed and neglected to request the said minor to cease playing around and about the

same, or to leave the immediate vicinity," etc. Unless it be accepted as the law that the owner of property is bound to keep a constant lookout in order to guard persons trespassing thereon from injury from some secret, hidden, or unknown danger, this allegation is clearly insufficient to show any breach of legal duty on the part of the defendant.

The excerpt from the opinion in *Egan v. Montana Cent. Ry. Co.*, standing alone, might be regarded as embodying this rule; yet, read in the light of the facts of the particular case, it states exactly the contrary. The plaintiff in that case was injured, while walking along the defendant's right of way in going from his work to his home, by a train of the defendant moving in the same direction. After getting upon the track he did not look back, though the view was unobstructed for some distance, and the train was approaching at the rate of only twenty miles per hour. At the time the engineer was looking back for signals from the rear of the train. He gave no signal or warning by sounding the bell or blowing the whistle. The contention was made by the plaintiff that the defendant company was guilty of negligence in thus failing to keep a lookout and to give warning of the approach of its train. In discussing the duty of the defendant company in the premises this court, including the passage above quoted, said: "No legal duty expressly to object to the use made of the track by trespassers rested upon the defendants, and hence, by omitting to warn or eject those who had theretofore intruded, they waived none of their rights, nor granted an implied license to the plaintiff authorizing him to do like acts in the future. The plaintiff and his companions were trespassers, and the mere fact that the defendants had, without formal or express objection, tolerated or suffered their use of the track as a footway, did not make the users licensees. The defendants owed to the plaintiff no greater or different duty than they owed to persons trespassing on other parts of their property. The defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act

occasioning injury, and the duty of exercising reasonable care to avoid injuring him after becoming aware of his presence on the right of way; but further than this the defendants were under no obligation to the plaintiff. In the case at bar the engineer at the time of the accident was looking backward for signals from the rear of the train, and did not keep a lookout for persons on the track; nor does the plaintiff contend that the engineer or any other employee of the defendants saw him in time to avoid striking him. The defendants were under no legal obligation to maintain an active lookout for the purpose of avoiding injury to the plaintiff, a trespasser; and there was therefore no breach of legal duty committed by the defendants in the omission—in other words, there was no negligence on the part of the defendants.”

The plaintiff was a trespasser. The defendant owed him no duty to keep a lookout for him, nor any other duty than to refrain from injuring him willfully or wantonly, or to use ordinary care to avoid injuring him if it discovered him in peril. It did not discover his peril. The injury was therefore not the fault of the defendant, because the impending peril not being discovered, the duty of exercising any care did not arise. The allegation quoted above does not state facts from which even an inference is permissible that at the time John Driscoll received his injury the defendant knew of his presence upon the premises, or that he was in dangerous proximity to the moving machinery by which he was injured. It amounts only to an allegation of a general duty owed to any trespasser to keep a lookout for him at all times, and to warn him off the premises, lest he might fall into hidden or secret danger. As we have seen, under the rule of the *Egan Case* the defendant did not owe him this duty. In failing to exercise any care to keep a lookout or warn him off the premises he was not guilty of negligence. Much might be said of the moral obligation resting upon those who were in charge of the defendant's machinery and operations to protect the infant from injury. Yet so long as they let him alone, and did not by any wanton

or willful course of conduct bring the injury upon him, they were not guilty of violating any legal duty toward him.

We held in the original opinion that the allegations of the complaint were not sufficient to show that John Driscoll was enticed or allured to go upon the premises by the particularly attractive character of the machinery there. There was, therefore, so far as the complaint shows, no invitation extended to him to go there, either express or implied. If there had been alleged facts and circumstances showing that John Driscoll was known by the agents of the defendant there present to be upon the premises, and in such close proximity to the moving machinery that he was about to and did receive injury by coming in contact with it, and that they neglected to exercise ordinary care, under all the circumstances, to prevent the injury, a wholly different question would have been presented. Under the rule stated in the *Egan Case*, the defendant would perhaps have been liable. A rehearing is denied.

Denied.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

NORMAN, APPELLANT, v. CORBLEY, RESPONDENT.

(No. 2,046.)

(Submitted December 15, 1904. Decided March 13, 1905.)

Water Rights—Irrigation—Appropriation—Priorities—Tenancy in Common—Abandonment—Conveyance of Rights—Prescription—Pleadings—Motion for Judgment—Cross-examination.

Judgment on Pleadings—Complaint—Denials—Proof.

1. Where denials contained in the answer required proof on the part of the plaintiff as to some of the material allegations of his complaint, plaintiff's motion for judgment on the pleadings was properly overruled.

32	195
39	379

Water Rights—Title to *Corpus* of Water—Prescription.

2. Under Civil Code, section 1880, giving the right to appropriate the waters flowing in a stream, the title to the *corpus* of such waters cannot be acquired so that a prior appropriator, who has all the water that his necessities require, cannot question the right of another to use the remainder of the water, nor maintain an action against him on account of such use, and the latter cannot, so long as the former's enjoyment of all the water that he needs remains unimpaired, acquire a prescriptive right to use any given quantity of the water to the detriment of the former's appropriation.

Water Rights—Abandonment—Intent.

3. Abandonment is a matter of intention, and consists in the giving up of a thing absolutely without reference to any particular person or purpose.

Water Rights—Joint Notice of Appropriation—Abandonment.

4. A joint notice, filed by successive appropriators of water, stating that they have a claim and right to use a given quantity of water on certain described lands, and that they appropriated the water as to one ditch in one year and as to another ditch in another year, does not of itself constitute or show an abandonment of prior appropriations, and the initiation of a new right and appropriation.

Water Rights—Tenancy in Common—Unity of User.

5. To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and if such right is destroyed, the common tenancy ceases to exist.

Water Rights—Notice of Appropriation—Effect.

6. Prior to March 12, 1885, no notice of the location or record of the appropriation of a water right was required. The Act of that date (Compiled Statutes of 1887, fifth division, section 1258), requiring persons who had theretofore acquired water rights to file a written declaration with the recorder, by its terms protected prior appropriations. *Held*, that the recording by previous appropriators of a notice in accordance with the Act did not of itself constitute an appropriation, nor affect, as between the appropriators, their respective rights to the water, but merely constituted notice to the world of their claims under their appropriations.

Water Rights—Joint Notice of Appropriation—Tenancy in Common.

7. Plaintiff's predecessors in interest appropriated waters for irrigation in 1866. Defendant made a subsequent appropriation in 1871 or 1874. In 1874 the parties, by oral agreement, and during that season only, used the water alternately. During one season in the early '80's there was a scarcity of water, and they used the same half and half. In 1885 plaintiff and defendant filed a joint notice of their appropriation, which stated that the appropriation of each amounted to two hundred inches. Plaintiff in no manner waived or abandoned at any time his prior appropriation. *Held*, that none of the things specified constituted a conveyance by plaintiff to defendant of any interest in the former's prior appropriation, that they were not evidence that one-half the water was not sufficient for plaintiff's use, that there was not any unity of possession in the ditches, land, date of appropriation, use of the water, or the right of its use, and hence there was no tenancy in common.

Water Rights—Rights of Prior and Junior Appropriators.

8. Under Civil Code, section 4005, requiring one to so use his own rights as not to infringe the rights of another, one who has a prior right to the use of the waters of one creek cannot let those waters run to waste, and use the full amount of his appropriation of the

waters of another creek to the detriment of a junior appropriator on the latter creek; but such junior appropriator cannot, as of right, compel the prior appropriator to exhaust his rights in the former creek before resorting to the use of the latter creek.

Water Rights—Evidence—Cross-examination.

9. Where a notice of appropriation of water filed by a party and testimony given by him are both before the court, it is not permissible to bring out, by a cross-examination of the party, discrepancies between his testimony and the contents of the notice.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by Theodore Norman against A. L. Corbley. From the judgment rendered, and from an order denying a new trial plaintiff appeals. Reversed.

Messrs. Hartman & Hartman, for Respondent.

The continuous and uninterrupted use of half of the waters of the creek by respondent, for the period of the statutes of limitations, under a claim of right, and knowledge of that claim and use on the part of the appellant, unquestionably establishes in respondent a prescriptive right, or a right acquired by adverse user, for all that is necessary to make a use adverse is a claim of right in the party using it and knowledge of the claim in the adverse party. (*Forgarty v. Forgarty*, 129 Cal. 46, 61 Pac. 570, bottom of page 571.) And where such use has been uninterrupted for the period of the statutes of limitations it ripens into a prescriptive title. (*Bree v. Wheeler*, 129 Cal. 145, 61 Pac. 782, 783.) The authorities are abundant upon this proposition, but no case has been found similar in its facts to the one at bar. The closest approach to the principle involved is probably found in the so-called *Agreed Line Cases*, where the courts state the rule thus: "Where coterminous proprietors of land in good faith agree upon, fix and establish a boundary line between their respective tracts of land, which is not the true line, but in which they acquiesce and under which they occupy for a period equal to that fixed by the statutes of limitation, the line so established is binding upon them and those holding under them or either of them; or in

the absence of any express agreement where the boundary has been recognized and the parties have used and occupied according to it for an extensive period, although less than the period of the statutes of limitations, they and all claiming under them will be estopped from afterward claiming a different line." (*White v. Spreckels*, 75 Cal. 616, 17 Pac. 715; *Cavanaugh v. Jackson*, 91 Cal. 580, 583, 27 Pac. 931; *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Blair v. Smith*, 16 Mo. 273; *Smith v. Hamilton*, 20 Mich. 438, 4 Am. Rep. 398.) The same principle underlies respondent's case.

The claim of respondent is that the parties became tenants in common, not of the water rights acquired by their predecessors respectively in 1866 and 1871, but of the waters of Corbley creek each to the extent of one-half thereof, for the purpose of the irrigation of their respective tracts of land and for the domestic purposes of defendant and the watering of his stock. The claim is not that respondent acquired the right claimed, by conveyance from appellant, but by such continuous use with the knowledge and acquiescence of appellant as to ripen into a prescriptive title. The use was a use of half the waters of the creek; prescriptive titles imply lack of conveyance; and the argument of counsel, as to the necessity for a written conveyance as the vehicle of title to water rights, and that water rights constitute real estate, is entirely beside the question. Title to real estate may be acquired by prescription as well as title to water rights, and it is the prescriptive right thus acquired by use that respondent relies upon.

It is immaterial what construction the court below put upon the water right location notice in question. It was simply one of the evidences of the recognition by both parties of their mutual claims to the waters of the creek. Nor is it material how much water was necessary for appellant's use or how much was necessary for respondent's use if they had mutually acquired a prescriptive title to half the waters of the creek. The question as to how much either of them might use or need could only become important as a circumstance in the case

tending to show the mutual use of the water by the respective parties.

Mr. John A. Luce, for Appellant.

A tenancy in common contemplates that each of the tenants in common is seised *per my* and not *per tout* and entitled to the possession of the whole. They hold by unity of possession, though their titles be distinct. If this unity is destroyed the tenancy no longer exists. (2 Blackstone's Commentaries, 190-192; *Carpentier v. Webster*, 27 Cal. 524.) No such tenancy as this ever arose in this case. (*Wheeler v. Ladd*, 40 Ark. 108; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Lockwood v. Mills et al.*, 3 Ohio, 21.) The Norman water right could only pass by a deed of the land or by special conveyance of the water right. (*Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; Civil Code, sec. 1510; 2 Am. & Eng. Ency. of Law, 2d ed., 526, 527, and cases cited.) The incident follows the principle, not the principle the incident. (Civil Code, secs. 1491, 4631.)

An estate in real property can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same or by his agent thereunto authorized by writing. (Civil Code, sec. 1500; Code of Civil Proc., sec. 3274.) As between appropriators of water the first in time is first in right. (Civil Code, sec. 1885; *Dunniway v. Lawson*, 6 Idaho, 28, 51 Pac. 1032; *Huning v. Porter* (Ariz.), 54 Pac. 584.)

The prior appropriator has the right to have the water so appropriated flow down to the point of his appropriation undiminished in quantity or quality. (*Bear River etc. M. Co. v. New York Mfg. Co.*, 8 Cal. 327, 68 Am. Dec. 325; *Hill v. King*, 8 Cal. 336; *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Natoma W. & M. Co. v. McCoy*, 23 Cal. 491; *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685; *Stein Canal Co. v. Kern Island Irr. Co.*, 53 Cal. 563; *Lobdell v.*

Simpson, 2 Nev. 274, 90 Am. Dec. 537; *Crane v. Winsor*, 2 Utah, 248.) A water ditch and the water right appurtenant thereto are real property. (*Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Lower King's R. etc. Co. v. Lower King's etc. Co.*, 60 Cal. 408.) An estate in a ditch and water right is real property, and an agreement for a conveyance thereof is within the statute of frauds. (Code of Civil Proc., 1971, 1973; *Smith v. O'Hara*, 43 Cal. 371; *Bradley v. Harkness*, 26 Cal. 77; *Lower King's R. etc. Co. v. King's River etc. Co.*, 60 Cal. 408; Angell on Watercourses, 168-171; Washburn on Easements, 23, 24; Gould on Waters, 300-321.)

There was no evidence whatever that Norman ever intended to abandon his priority of right. There can be no such thing as an abandonment to a particular person. (*Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 576, 577; *Stevens v. Mansfield*, 11 Cal. 363-366; *McLeran v. Benton*, 45 Cal. 467.) The same irrigation ditch may have two or more priorities belonging to the same party or different parties. (*Thomas v. Guirand*, 6 Colo. 530; *Farmers' High Line etc. R. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1038.) The water right notice was not necessary and did not add to or take from the priority of rights by virtue of the respective appropriations of the plaintiff and defendant. (*Salazer v. Smart*, 12 Mont. 395, 30 Pac. 676; *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Burrows v. Burrows*, 82 Cal. 564, 23 Pac. 146.)

While there was plenty of water, any acquiescence which Norman might have made in its use by Corbley could not have any binding force. (*Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395; *Boggs v. Mining Co.*, 14 Cal. 368; *Lux v. Haggin*, 69 Cal. 255-266, 10 Pac. 674; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 194, 195, 30 Pac. 623.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from a judgment and an order overruling plaintiff's motion for a new trial. The complaint alleges that

the plaintiff is the prior appropriator, and has the prior right to the use of two hundred inches of the waters of Corbley creek, Gallatin county; that the defendant interfered with this right. Plaintiff asked judgment that he be decreed to be the owner of the right to the prior use of two hundred inches of the waters of Corbley creek, and that the defendant be restrained from interfering with this right. The answer of defendant denies that the plaintiff's prior appropriation consists of more than one hundred inches of the waters of said creek, and alleges an appropriation by the defendant; denies also that the defendant had interfered with the plaintiff's rights.

It appears from the facts of the case that the predecessors in interest of the plaintiff in 1866 appropriated certain waters of Corbley creek for the purpose of irrigating certain lands; that the plaintiff afterward succeeded to the rights of the original appropriators, both in the water and in the land; that this water so appropriated has been used on this land continuously since that time; that in 1871 the defendant appropriated certain waters from this same creek for the purpose of irrigating lands then held by him; that the defendant has since occupied said lands and used said water for that purpose; that neither party filed nor recorded any notice of his appropriation until 1885, when, by agreement, they filed one notice, which is in part as follows: "Be it known that A. L. Corbley and Theodore Norman * * * do hereby publish and declare, as a legal notice to all the world: I. That we have a legal right to the use, possession and control of, and claim four hundred (400) inches of the waters of Corbley Creek in said County and Territory, for irrigating and other purposes. II. [Describes the land on which the water is to be used.] III. That we have taken said water out of, and diverted it from said Corbley Creek by means of two ditches, which said ditches are 72 inches by 48 ditch No. 1, 120 inches by 48 ditch No. 2 inches in size, and carries or conducts 200 each inches of water from said Creek; said Ditch No. 1 taps and diverts the water from said stream at a point upon its South bank 125

feet Northwest from a large boulder marked XX and lying at, or near the mouth of Corbley Canon—said ditch No. 2 taps and diverts the water from said stream at a point upon its North bank 100 feet Northwest of a large boulder marked X being 278 paces above the mouth of said Corbley canon, thence running or to run, to and upon said described land. * * *

IV. That we appropriated and took said water on the — day of June A. D. 1866 as to ditch No. 1 and ditch No. 2 was appropriated the 15th day of June, 1874, by means of said ditches. V. That the name of the appropriator of said water as to ditch No. 1 was Wm. H. Arnold and as to ditch No. 2 A. L. Corbley." It is claimed by the defendant that the date "1874" is error, and should read "1871." Which date is correct is immaterial to the questions presented on this appeal. The court found to the effect that the plaintiff and defendant were tenants in common of the waters of Corbley creek, each to the extent of one-half thereof, and that each of the parties is entitled to the use of one-half the waters of Corbley creek; that the defendant, by the use of one-half the waters of the creek, had not interfered with plaintiff's rights; that the plaintiff was not entitled to maintain this action.

Several questions of law are presented which are conclusive of the case, and will be treated under appropriate headings.

1. The plaintiff filed a motion for judgment on the pleadings, which motion was overruled. The denials contained in the answer required proof on the part of the plaintiff as to some of the material allegations of his complaint, and the motion was properly overruled.

2. Respondent claims that by continual user of one-half of the waters of Corbley creek since 1874 he has acquired a prescriptive right to continue the use thereof. Neither party could acquire any title to the *corpus* of this water, but only to the use thereof. (Civil Code, sec. 1880; *Middle Creek Ditch Co. v. Henry et al.*, 15 Mont. 558, 39 Pac. 1054.) So long as the plaintiff had all the water his necessity required, he could not complain, nor raise any question as to the right

of the defendant to use all that remained. "In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the right is claimed." (*Chessman v. Hale*, 31 Mont. —, 79 Pac. 254; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395.) There is no evidence in this record that plaintiff did not have all the water required for his use from the date of its appropriation to the time this dispute arose, and the claim of a prescriptive right cannot be maintained.

3. To sustain the findings of the court it is necessary that there should have been either an abandonment of plaintiff's prior appropriation or a conveyance of an interest therein. "Abandonment is the giving up of a thing absolutely without reference to any particular person or purpose." (1 Cyc. 4.) Neither party could abandon to the other, either with or without a consideration, for that would amount to a sale or gift. Abandonment is a matter of intention. (*Middle Creek Ditch Co. v. Henry et al.*, 15 Mont. 558, 39 Pac. 1054; *Wood v. Lowney et al.*, 20 Mont. 273, 50 Pac. 794.)

To constitute an abandonment here, it would be necessary that there be an absolute surrender of the rights acquired by the appropriations of 1866 and 1871 or 1874, and the initiation of a new right subsequent to the abandonment. This new right is claimed under the notice of 1885. This notice itself does not contain any evidence of any intention to abandon, but adheres to the original appropriations, and both plaintiff and defendant deny that there was any intention to abandon. There is nothing in this record that sustains any plea of abandonment.

4. To constitute a tenancy in common there must be a right to the unity of possession (17 Am. & Eng. Ency. of Law, 2d ed., 651, and cases), and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself. The plaintiff's right was initiated

in 1866, and his ditch tapped the creek on the south bank, and extended southwest to the lands irrigated. The defendant's right was initiated in 1871 or 1874, and his ditch tapped the creek on the north bank, and extended northwest to the lands irrigated. Neither piece of land could be irrigated from the other ditch. The rights acquired by virtue of these former appropriations were vested and complete prior to the filing of this notice in 1885. That notice was not an appropriation, but a declaration relating to former appropriations. Prior to March 12, 1885, no notice of location or record of appropriation was required. The very terms of the Act itself protected prior appropriations. (Comp. St. 1887, sec. 1258, div. 5; *Salazar v. Smart et al.*, 12 Mont. 395, 30 Pac. 676.) The recording of that declaration only had the effect of giving notice to the world that these parties claimed certain appropriations. (*Murray v. Tingley et al.*, 20 Mont. 260, 50 Pac. 723.) The appropriation claimed by plaintiff was complete in 1866. The evidence is not specific as to the exact number of inches appropriated. Arnold, the original appropriator of the Norman water right, testified that he constructed that ditch in 1866, and that "it carried all the water there was in the creek at that time," and the defendant testified that "four hundred inches is the average flow of this stream, though it varies at times from one hundred inches to six hundred inches."

In the notice of water right filed in 1885 each party concedes that the other's ditch carries two hundred inches, and claims an appropriation of two hundred inches of water carried by each ditch, and they relate this back to the date of the respective appropriations. This is a tacit admission that each of these appropriations was two hundred inches of the waters of Corbley creek; but the Norman appropriation was prior in time to the Corbley appropriation. When, then, did Corbley acquire any interest in this prior appropriation? There was neither abandonment nor waiver by plaintiff of this prior right. The notice of 1885 does not purport to be and is not a conveyance, and there is no evidence of any conveyance, either written or

oral, if an oral conveyance could be made. There is evidence that in 1874 the parties, by oral agreement, and during that season only, used the water alternately; but this was not a conveyance. The defendant also testified that during one season in the early '80's there was a scarcity of water, and he and Mr. Norman used the water half and half; but this was not a conveyance, nor is it evidence that one-half the water was not sufficient for plaintiff's use. It appears from this record that there was not any unity of possession in the ditches, land, date of appropriation, use of the water, or the right to its use, and there is no tenancy in common. (See *Crowder v. McDonnell et al.*, 21 Mont. 367, 54 Pac. 43.)

It appears from the evidence that the plaintiff has a prior right to the use of one hundred and twenty-five inches of the waters of Limestone creek, but the defendant cannot, as of right, compel the plaintiff to exhaust his rights in Limestone creek before he can resort to the right of his use to the waters of Corbley creek. This would interfere with the rights of junior appropriators, if there are any, to the waters of Limestone creek, who are not parties to this suit. The plaintiff, it is true, would not be permitted by a court of equity to permit the water of Limestone creek to run to waste, and at the same time use the full amount claimed by him of the waters of Corbley creek, to the detriment of a junior appropriator (section 4605, Civil Code); but this fact would not affect the abstract right of plaintiff, nor destroy the rights acquired by his prior appropriation.

The court, having found that the plaintiff and defendant were tenants in common, did not fix the date of the respective appropriations, but, inasmuch as this theory cannot be sustained, upon the retrial of the case it will be the duty of the court to fix the dates of these respective appropriations by the plaintiff and defendant, and to determine the amount of plaintiff's appropriation. (*McDonald v. Lannen et al.*, 19 Mont. 78, 47 Pac. 648.)

The appellant also complains that he was not permitted to cross-examine the defendant more fully regarding this notice of appropriation filed in 1885. From the offer made it appears that the object of this evidence was to show that there was a difference between the testimony of the witness and the contents of the notice of 1885. The evidence for that particular purpose was not admissible, for both the notice and the testimony were before the court, and the court could determine what difference, if any, existed.

We think this judgment and order should be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

Reversed and remanded.

MR. JUSTICE HOLLOWAY, being disqualified takes no part in this decision.

Rehearing denied April 11, 1905.

WAGNER, RESPONDENT, v. ST. PETER'S HOSPITAL,
APPELLANT.

(No. 2,055.)

(Submitted December 21, 1904. Decided March 13, 1905.)

Building Contract—Performance—Judgment by Subcontractor Against Principal Contractor—Res Judicata—Evidence—Sufficiency—Corporation—Authority of Trustees—Ratification—Burden of Proof—Answer—Failure to Deny Allegations—Effect.

Building Contracts—Subcontractor—Judgment—*Res Judicata*—Owner.

1. Where a subcontractor did the painting of a building for the contractor who had undertaken the construction of the entire building, a judgment in favor of the subcontractor, in a suit by him against the principal contractor to recover on account of the work

done, is not *res judicata* as to the owner, so as to bar litigation of the question, between the owner and the principal contractor, whether the painting was done in accordance with the principal contract.

Corporations—Trustees—Powers.

2. A corporation is not liable on an agreement made by one or two of its trustees, in the absence of authority to bind the corporation having been delegated to such trustees, or ratification of the agreement by the corporation.

Action on Building Contracts—Corporation—Liability—Burden of Proof.

3. In an action to recover an alleged balance due on a contract for the construction of a building for a corporation, in which plaintiff sought to establish the liability of the defendant corporation for money paid in excess of a specified sum for work done by a particular person at the request of the architects, by showing consent of one or two of the defendant's trustees to the agreement, the burden was on plaintiff to show the authority of the trustees, or ratification of the agreement by the corporation.

Action on Building Contract—Lien—Pleadings—Answer—Replication.

4. Where a building contract provided that the owner might protect itself against any lien which might be filed on the building by withholding from the contractor a sum sufficient to liquidate the same, and in an action by the contractor to recover an alleged balance due on the contract, the defendant alleged in its answer that a lien was filed for a certain sum and was paid by the defendant, the failure of the plaintiff to deny the allegations by his replication entitled the defendant to a deduction from the contract price in the amount of the lien discharged.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Edward Wagner against St. Peter's Hospital.
From the judgment, defendant appeals. Reversed.

Messrs H. G. & S. H. McIntire, for Respondent.

The hospital was identified with Wagner in interest as to the subject matter of the suit of *Streets v. Wagner*. The painting work was a part of the contract between Wagner and the hospital. The question whether or not Streets had done his work according to his contract with Wagner, and the result of the trial of that question necessarily determined the question as to Wagner's having performed his principal contract with the hospital. The litigation of this question by Wagner was for the benefit of the hospital. So likewise was every particle of work done by Wagner and his subcontractor under the contract. The hospital was directly interested in the subject matter of the suit of *Streets v. Wagner*; it had no-

tice of that suit; and two of its trustees, Mr. Day and Mr. Wickes, testified as witnesses upon the trial in favor of the defendant. The hospital under our intervention statute, Code of Civil Procedure, section 589, could have been made a party, and as such could have had the right to adduce testimony, to cross-examine witnesses adduced on the other side, to make defense, control the proceedings and appeal from the judgment. (*Shoemaker v. Finlayson*, 22 Wash. 12, 60 Pac. 50; *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *Castle v. Noyes*, 14 N. Y. 329; *Glide v. Dewey*, 83 Cal. 477, 23 Pac. 706-709; *Murray v. Lovejoy*, 2 Cliff. 191, 17 Fed. Cas. No. 9963.)

When a party is responsible over to another, either by operation of law or by contract, and such party has notice of the action and an opportunity to participate in the trial of the case, the judgment rendered is binding upon the party who is ultimately responsible in the case. (2 Black on Judgments, sec. 574; Freeman on Judgments, secs. 174-179.)

A very frequent illustration of this proposition of law is found in cases where municipal corporations are sued for injuries caused by obstructions in the streets, and after judgment against the corporation, numerous cases are found wherein the corporation has sued the author of the obstruction, and the judgment in the first-mentioned suit has been held *res judicata* in the second suit. (2 Dillon on Municipal Corporations, sec. 1035, and cases cited; *Washington Gas Light Co. v. Dist. Col.*, 161 U. S. 316, 16 Sup. Ct. 564; *Robbins v. Chicago*, 4 Wall. 657.)

Counsel for appellant say that this doctrine of liability over is confined to actions of tort, and that counsel have been unable to find a case applying the rule, except those in which tort was the basis of the action. But this doctrine is not limited to actions of tort. Wherever the parties sustain to one another the relation of principal and agent, principal and surety, master and servant, employer and employee, insurer and reinsurer, or contractor and subcontractor, and there is a liability

over, either by contract or operation of law, the rule applies, (*Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417; *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 432, 9 Pac. 712; *Bridges v. McAllister*, 106 Ky. 791, 90 Am. St. Rep. 267, 51 S. W. 603, 45 L. R. A. 800.)

Messrs. Carpenter, Day & Carpenter, for Appellant.

The only persons as to whom judgments are conclusive are (1) parties and their successors in interest by title subsequent to the commencement of the action (section 3196, Code of Civil Procedure), and (2) those to whom the parties to the record stand in the relation of a surety. It was contended in the court below, and the court based its rulings upon the contention, that the contractor was, as to the subcontractor, a surety for the owner, and therefore the case came within the provisions of section 3200. In support of this contention, among others, the case of *Hoppaugh v. McGrath*, 53 N. J. L. 81, 21 Atl. 106, was the principal case cited, to the effect that where one was liable over to another, the former is bound by a judgment establishing the liability of the latter. It will be noted that the case of *Hoppaugh v. McGrath* was an action in tort. In such actions the liability is clearly recognized. But in actions on contract no such rule applies. There the liability is based upon the terms of the contract, and one not a party to the record is not bound by it unless he has contracted in specific terms so to be bound. (*Pico v. Webster*, 14 Cal. 203, 73 Am. Dec. 647; *Rodini v. Lytle*, 17 Mont. 448, 43 Pac. 501.) This rule is expressed in the terms of section 3200, and unless the party on the record stands in the relation of surety for another, such other person is not conclusively bound. But the suretyship here spoken of is a contractual relation, and not one arising from liability over for one's own wrong, as in the case of torts. The term "surety" is here used in its

legal sense and must be given its known legal meaning. (26 Am. & Eng. Ency. of Law, 2d ed., 607.)

The relationship of surety does not exist between the owner and the contractor with reference to the latter's liability to the subcontractor. No privity of contract exists between the owner and the subcontractor. In fact the owner is not liable to the subcontractor at all. The lien given to the subcontractor is a lien upon specific property, and thus negatives any general or personal liability of the contractor. And this liability can only be enforced in an action to which the contractor is a party, and in which he is the principal debtor. (*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303; *Estey v. Hallack etc. Lumber Co.* (Colo. App.), 34 Pac. 1113.) In New Jersey, which has the system of direct liens to subcontractors in force in Montana, it has been held, in an action to enforce the lien, that a judgment recovered by the subcontractor against the contractor is not binding upon the owner, when he was not a party to the proceedings. (*Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40.) If such a judgment is not conclusive in an action to enforce the lien given by statute upon the specific improvement, with much less reason can it be argued that it is conclusive in this action.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court. Appeal from a judgment.

The suit was to recover a balance alleged to be due on a contract for repairing and altering St. Peter's Hospital, in the city of Helena. The full contract price was \$4,748, of which the defendant had paid the sum of \$4,348, but refused to pay the balance of \$400, because it claimed that plaintiff had failed to fully complete his contract.

Plaintiff alleges that he entered into a subcontract with one Burley R. Streets to do the painting according to the specifications, and under the directions and to the satisfaction of the architects, and "which painting was thereafter done and performed by said Streets"; that thereafter Streets commenced

an action against plaintiff to recover the contract price of \$350; that appellant had full notice of such suit; that Streets recovered a judgment against plaintiff for \$371.50 damages and \$26.80 costs of suit; that by said judgment it was in effect decided and determined that Streets had fully and completely performed his said subcontract for painting according to the specifications for said work; that plaintiff had paid such judgment; that he had furnished all materials and performed all the work under and in pursuance of said contract, and had duly completed the same, and in all respects fully performed all the conditions of said contract on his part to be performed; wherefore he prayed judgment for \$400, the balance due on the contract, and the further sum of \$26.80 which Streets had recovered against him for costs, together with interest. It is apparent from this complaint that plaintiff relied on the Streets judgment as being *res adjudicata* against appellant on the proposition that plaintiff had fully performed his contract.

The appellant filed its answer, and denied that the judgment of Streets against the plaintiff was *res adjudicata* against it at all; and for further answer alleged, after setting forth a portion of the contract between it and plaintiff, that he failed to complete the painting specified in the contract and specifications, and that it had demanded of him that he do such painting; that he had refused, and that it had caused the same to be completed at a cost of \$305. The answer further alleged that plaintiff had entered into a subcontract with one Gust G. Minter for placing a roof on the building, at a price of \$159.25, and that plaintiff failed to pay Minter any amount other than the sum of \$110; that Minter filed a mechanic's lien for the balance of \$49.25, which the appellant paid in order to release the lien, and alleged that under the terms of the contract it was entitled to retain that amount out of any moneys due plaintiff on the contract. It was then alleged that there was only a balance of \$44.75 due the plaintiff, which it was ready and willing to pay, and admitted that plaintiff was entitled to a judgment for that amount. In the replication a

portion of this new matter was denied, and a portion admitted. The cause came on for trial before a jury. After the presentation of plaintiff's testimony, counsel for defendant requested the court to instruct the jury to find a verdict for plaintiff for the sum of \$44.75, which request was refused. Defendant offered no testimony. The court, upon request of plaintiff, instructed the jury to bring in a verdict for him for the sum of \$400. Such verdict was rendered, and a judgment entered thereon, from which this appeal is taken.

The main question presented in the briefs of the respective counsel, and on their argument before this court, was as to the effect of the Streets judgment, counsel for appellant contending that said judgment was not *res adjudicata* against it for any purpose, and counsel for respondent contending that said judgment was *res adjudicata* as to the proposition that the contract between the appellant and respondent had been fully performed.

Counsel for respondent cite to the court and rely very strongly upon, the case of *Hoppaugh v. McGrath*, 53 N. J. L. 81, 21 Atl. 106, as being conclusive upon this proposition in their favor. An examination of this decision leaves us of the opinion that it has no bearing upon the case at bar. In that case A, the owner of property, let a contract to B to erect certain buildings thereon. B subcontracted with C to do the masonry work. A sued B for breach of contract because of defective masonry work. B notified C of the pendency and object of this suit, and called on him to come in and help defend it, which C disregarded. A recovered a judgment. B then sued C for breach of contract because of defective masonry work, and the court held that the judgment of A against B was conclusive against C. We are of the opinion that this decision is correct, on the principle that C, by failing to perform his contract with B, to B's damage, and having notice of A's suit, was liable therefor. A recovered a judgment against B for a breach of the contract between them. This breach was caused by the act of C, and he was clearly

liable over to B for whatever damages A sustained because of such breach. The case comes clearly within the principles uniformly adopted and enforced in cases where a city is held liable for negligence occurring through the fault or act of some third person, and other cases of similar character. In such cases such third party is always liable over, upon the principle that, except for his act, no liability whatever would have existed. The same court which decided the *Hoppaugh Case* afterward held that a judgment procured by a subcontractor against the principal contractor, for which the subcontractor sought to enforce a lien against the owner of the premises, was not conclusive upon such owner, and says: "Nor do we think the owner is bound by the fact that a judgment has been recovered against the contractor by the claimant. The recovery of such judgment is evidential of the amount due upon his claim, and, without other proof, may be conclusive. But this does not prevent the owner from showing that the claim is excessive, and the judgment thereon is likewise so, or that it is fraudulent." (*Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40.) Counsel for respondent says that this opinion does not refer to the *Hoppaugh Case*, and therefore does not overrule it. There was no occasion to refer to that case or overrule it. These decisions are entirely consistent with each other, and, in our judgment, properly announce the law.

There is a vast difference between the *Hoppaugh Case* and the one under consideration, as is recognized in *Taylor v. Wahl*, *supra*. Here the appellant has done nothing by which the subcontractor was wronged or injured. No contract relation existed between them, either express or implied. By virtue of the contract between appellant and respondent, and the statutes of this state, Streets, the subcontractor, by a proper proceeding might have made appellant's property liable for his claim against respondent, if it was not paid or liquidated, but under no circumstances could Streets make appellant personally liable to him for any amount. There was no liability over to respondent. Appellant could not have legally inter-

vened in, become a party to, or entitled to say or do anything in the suit of Streets against respondent, because it had no interest therein, and was and could not be made liable thereon. It was a stranger to that suit, and not privy to either party, or in any way or manner interested therein.

Suppose, by the contract between respondent and Streets, he was only to paint the outside of the building; suppose Streets performed such contract; his work would not include all the painting provided for by the contract between appellant and respondent. Could a judgment in Streets' favor against respondent, upon the theory that he (Streets) had fully performed his contract, be binding upon appellant? It could not have the effect of concluding appellant to the extent that respondent had fully performed his contract with appellant. If not, upon what theory could a judgment of Streets against respondent be binding upon appellant, if the contract between Streets and respondent was identical with the contract between appellant and respondent? Appellant would have no more to do with the contract between respondent and Streets in one instance than in the other. Appellant could not enforce any contract between respondent and Streets, and could have no action against Streets for a breach thereof. Streets' breach of such contract could not relieve respondent from a judgment for damages in favor of appellant for a breach of his contract with it, even though such breach was occasioned by Streets. Appellant might sue respondent and recover from him damages for such breach. Respondent would be bound under his contract with appellant to fully perform its terms before he could maintain an action upon it.

In order to enable Streets to enforce a lien upon appellant's property, he would be compelled to make respondent a party to that suit, and litigate with him the correctness of his account, if respondent disputed it. As well said by this court in the case of *Missoula Merc. Co. v. O'Donnell*, 24 Mont. 74, 60 Pac. 594, 597: "The O'Donnells were not made parties. Under the proof in the record, E. C. O'Donnell contracted the debt

for the materials furnished by the plaintiff and became personally liable to pay it. This debt is the only foundation there is for this suit. If there is no debt, there can be no lien. The existence of the lien depends upon the existence of the debt, for which it stands as security. It cannot be enforced until the fact of the indebtedness be shown. This fact cannot be shown except in proper judicial proceedings for that purpose, to which proceeding the debtor is made a party. In other words, no judgment can be rendered or enforced in any case until the debtor is made a party to the proceeding, and the fact and amount of his liability are judicially ascertained. (*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Vreeland v. Ellsworth*, 71 Iowa, 347, 32 N. W. 374; *Lookout Lumber Co. v. Mansion Hotel etc. Ry. Co.*, 109 N. C. 658, 14 S. E. 35; *Simickson v. Lynch*, 25 N. J. L. 317; *Estey v. Lumber Co.*, 4 Colo. App. 165, 34 Pac. 1113.) The lien is not in any sense the, or any, cause of action. It is merely an incident, ancillary or subsidiary to the main fact—which is the debt. The creditor may waive his lien—the incidental right—and pursue the debtor upon his personal liability, but he cannot enforce the lien without ascertaining both the fact of indebtedness and the amount of it in the only way recognized by law; that is, by making the debtor a party, and litigating the question of indebtedness with him." Even then, appellant would not be *personally* liable (*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303), but the lien could only be enforced against its property.

If appellant could not be made personally liable by a direct proceeding, such liability could not be imposed upon it by any collateral one. We are clearly of the opinion that the judgment of Streets against respondent was not *res adjudicata* against appellant in any respect, and was only evidence that respondent owed Streets that amount on their contract. In order for plaintiff to recover the balance due on his contract from appellant, he was bound to show full performance thereof. It seems to be conceded that the contract specified that he should

paint the rooms in the second and third floors. He admitted in his testimony, when called as a witness in his own behalf, that he was requested by appellant "to paint these two floors," and that he refused to do so. Therefore, according to his own uncontradicted testimony, he had not fully performed his contract. The action being upon the contract, and plaintiff showing that he had not fully performed the same, he would not ordinarily have been entitled to any judgment thereon. But appellant admits he is entitled to a judgment for \$44.75.

Respondent's position in regard to the Minter labor and lien is that he let a subcontract to one Krigbaum for placing the roof on the building for the sum of \$110; that the architects of the building told him that appellant wanted the roof constructed by one Minter, of Great Falls, and directed respondent to cancel his contract with Krigbaum, and cause the roof to be constructed by Minter; that he canceled the Krigbaum contract, but entered into no contract with Minter, who constructed the roof; that he paid Minter the sum of \$110, which he agreed to pay Krigbaum for the same work; that at the time the architects directed this change they informed him that if there was any extra charge by Minter the appellant would pay it. The only proof of the authority of the architects to make such an arrangement, if one was made, is that one or two of the trustees of appellant told them that the appellant would pay the difference.

It must be remembered that the appellant is a corporation, and, before it could be bound by what one or two of its trustees may have told the architects, the burden was upon the plaintiff to show that said trustee or trustees had authority to so bind the corporation, or that the corporation ratified it. No evidence of this character was presented on the trial of the case.

The contract, as alleged in the answer, provides that appellant might protect itself against any lien which might be filed upon the building by withholding from respondent a sum sufficient to liquidate the same, and the answer alleges that Minter filed a lien for the sum of \$49.25, which was discharged upon

payment by appellant. Neither of these allegations is denied in the replication. We are therefore of the opinion that appellant had the right to liquidate this lien, and deduct the amount thus paid over from any amount due respondent upon the contract.

We are of the opinion that the court below should have ordered a judgment for plaintiff in the sum of \$44.75, and we advise that the judgment appealed from be reversed, and the district court be directed to enter a judgment for plaintiff in the sum of \$44.75.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded to the district court with directions to enter a judgment for plaintiff in the sum of \$44.75.

Reversed and remanded.

BEBEE ET AL., RESPONDENTS, v. JACKSON ET AL., APPELLANTS.

(No. 2,112.)

(Submitted March 13, 1905. Decided March 18, 1905.)

Injunctions—Action on Bond—Complaint—Insufficiency.

1. A complaint in an action on an injunction bond is fatally defective where it fails to state that the damages claimed by plaintiffs have not been paid.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by H. R. Bebee and another against George J. Jackson and others. From a judgment for plaintiffs, certain defendants appeal. Reversed.

Mr. Jno. T. Smith, and Mr. Geo. W. Pierson, for Appellants.

Mr. Sydney Fox and Messrs. Word & Word, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court. Appeal from a judgment. Action upon an injunction bond.

The complaint alleges, among other matters, that certain of the defendants to this suit instituted an action against plaintiffs herein and others on January 11, 1901, for the purpose of enjoining them from using the waters of Red Lodge creek; that such injunction was granted upon the giving of an undertaking; and that on March 3, 1902, the injunction suit was heard, and a decree entered in favor of the defendants therein. The complaint further alleges plaintiffs' damages on account of the issuance and service of said injunction, and prays for judgment against the principals and sureties on said undertaking for the amount of the alleged damages. The case was tried before a jury, which returned a verdict in favor of plaintiffs, and judgment was entered thereon.

The appellants, among other errors assigned, insist that the complaint does not state facts sufficient to constitute a cause of action, in that "it fails to allege that the damages claimed by plaintiffs, or either of them, have not been paid." Such allegation is entirely absent from the complaint. It is necessary to the sufficiency of a complaint, under the decisions of this court in *Van Horn v. Holt et al.*, 30 Mont. 69, 75 Pac. 680, and *State v. Lagoni et al.*, 30 Mont. 472, 76 Pac. 1044.

We therefore advise that the judgment appealed from be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

Reversed and remanded.

CLARK, APPELLANT, v. WALL ET AL., RESPONDENTS.

(No. 2,146.)

(Submitted March 14, 1905. Decided March 18, 1905.)

*Mines—Licenses—Character of Licensee's Estate—Revocation of License—Denial of Licensor's Title—Estoppel—Injunction.***Mines—Licenses—Verbal Agreement—Revocation—Rights of Licensees.**

1. A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license, revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a right to the ore, as personalty, when extracted from the mine.

Pleadings—Mines—Injunction—Estoppel—Ownership of Premises.

2. Where, in an action for an injunction, the complaint alleged that defendants' use of mining premises was merely permissive, and that their right to such use was terminable at plaintiff's pleasure, the defendants, having failed to file any answer or pleading, are estopped to contend that plaintiff was not the owner of the premises.

Mines—Licenses—Injunction—When Proper.

3. Where a license to extract ores from a mining claim was revoked, and the licensees, who were insolvent and unable to respond in damages, nevertheless refused to surrender possession of the claim, and continued and threatened to continue the mining of the ore, thereby destroying the substance of the licensor's estate in the claim, the latter was entitled to an injunction restraining the further continuance by the licensees of their wrongful acts.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by Clinton C. Clark against Robert Wall and others. From an order refusing to issue an injunction, plaintiff appeals. Reversed.

Messrs. McBride & McBride, Mr. J. E. Healy and Mr. J. E. Murray, for Respondents.

The agreement stated in plaintiff's complaint contains all the elements which constitute a lease or tenancy at will, and is of a character and for purposes common to mining regions

of this state. Section 1240, Civil Code of Montana, provides that a tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant to remove from the premises within a period of not less than one month, to be specified in the notice. Under the law and under the terms of the letting, as set forth in plaintiff's complaint, the notice prescribed by section 1240 above was indispensable to terminate the tenancy. The maxim "That is certain which can be made certain," is not applicable. It appears to be the contention of appellant that the parties having provided for a termination of the lease, upon the happening of a certain event, or upon the giving of notice, as in this case, the giving of such notice absolutely terminated the lease and the relationship of landlord and tenant was immediately at an end. This is not so where the alleged event or contingency consists merely of the exercise of the landlord's will. (*Woodrow v. Michael*, 13 Mich. 186-190.)

Contracts are presumed to be entered into in contemplation of the law, which engrafts into every relationship entered into, certain rights and obligations. Here the parties are presumed to have had in mind the provisions of the law applicable to such a state of facts, and, in providing for the notice and demand, they recognized an estate in defendants, which can only be terminated in a given manner. If no possession were rendered, and no estate given to the defendants, a notice and demand would not be necessary. It is therefore apparent that the statutory notice was intended by the parties. The complaint fails to establish clearly any subsisting interest or right of possession in the plaintiff, and to that extent fails to set forth sufficient facts to justify the relief sought. (*Campbell v. Flannery et al.*, 29 Mont. 246, 74 Pac. 450.) The doctrine that a tenant cannot dispute his landlord's title can have no place here, for the reason that in the complaint the plaintiff himself shows that the title of the property is in a third party.

Equity will not interfere by injunction where title or right of possession is disputed, and will usually leave such contro-

versies to be determined in a legal forum by the usual legal remedies. If a tenancy at will be appellant's theory, and sufficient notice has been given to terminate the same, the Code of Civil Procedure provides a manner in which the possession may be summarily obtained. By an action of unlawful detainer a landlord may be placed in the full, complete and immediate possession of the premises. If, on the other hand, he proceeds on the theory that the arrangement constituted a mere license or permission, not connected with an interest, then possession is not transferred and the revocation of the license would place the parties in their original position, and the action of the defendants in wrongfully taking or withholding possession, would be remedied in an action of forcible entry and detainer—giving plaintiff an immediate and complete relief. We therefore submit that on the face of the record it appears that plaintiff and appellant has a remedy at law, which is immediate and adequate and even more complete than in equity.

Mr. J. L. Wines, for Appellant.

Whatever the relation was between appellant and respondent Wall, whether it be that of landlord and tenant, or that of licensor and licensee, the tenant or licensee is not in a position to controvert the right, interest, title or claim of appellant, having contracted with him upon the theory that the appellant did have such right, title, interest or claim. It is the application of the familiar doctrine of estoppel. (2 Taylor's Landlord and Tenant, 8th ed., sec. 628.)

Where parties have provided by contract that a lease, license or permission should terminate upon the happening of a certain event, or upon the giving of notice, as required in this case, the giving of such notice absolutely terminates the right, and no other notice is required. It is the same in effect as in cases where the contract itself expressly limits the right or permission during a given period. In such cases no notice is necessary in order to terminate the tenancy. The maxim

is, "That is certain which can be made certain." (*Canning v. Fibush*, 77 Cal. 196, 19 Pac. 376; *Hihn v. Mangentberg*, 89 Cal. 268, 26 Pac. 968; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *People ex rel. Gleahill v. Shackno*, 48 Barb. 551.)

MR. COMMISSIONER BLAKE prepared the opinion for the court.

The plaintiff appeals from an order refusing to issue an injunction. The complaint was filed November 26, 1904, and alleged the following facts: The Anaconda Copper Mining Company owned, and still owns, a patented mining claim designated as the Modock, and situated in the county of Silver Bow, and entered into a verbal contract about the — day of June, 1903, whereby the plaintiff leased the property and continued in the possession thereof until April 20, 1904. About this time the plaintiff entered into a verbal agreement with defendant Wall to the effect that Wall should have permission and privilege of entering the claim by a shaft called the "Tripod Shaft," and connected with certain stopes and a drift. Under this agreement, Wall "might enter into said shaft and into said workings, and might mine and extract ore from the same, during the will and pleasure and during the consent of this plaintiff, with the express understanding that said privilege, permission, or right to mine in said mining premises should terminate and cease whenever or at such time as this plaintiff might desire, and that this plaintiff should have the right to terminate said privilege or permission upon the part of the said Robert Wall whenever this plaintiff might so desire, and upon notice and demand therefor being given by this plaintiff unto the said defendant Robert Wall."

The complaint further alleges that the plaintiff served written notice upon Wall November 17, 1904, that the permission and privilege to possess and mine the claim would terminate November 25, 1904. The defendants Sutton and Johnson claim to have succeeded to some right under the agreement between the plaintiff and Wall, and to be in the possession of the

property jointly with Wall. When demanded, the defendants refused to surrender the possession of the claim, and are mining and removing, and will continue to mine and remove, large quantities of ores and minerals, and convert the same to their own use. The premises are valuable only for the gold, silver, and copper therein, and a continuance of the acts of defendants will destroy the leasehold interest of the plaintiff and the claim for mining purposes. The defendants are insolvent and unable to respond in damages on account of their acts, and any judgment that the plaintiff might recover against them for the value of the ores and minerals so converted would not afford any compensation. The defendants threaten to continue in the possession of the claim, and mine and extract ores and minerals therefrom, and convert the same, and will, unless restrained by order of the court, remove large quantities of said ores and minerals. The interest of the defendants in the claim has ceased and is without right.

The prayer of the complaint is in the usual form—that the defendants be adjudged to have no right or title to the claim as against the plaintiff; that the defendants be enjoined and restrained from mining, extracting, and removing ores therefrom; that a temporary restraining order of the court be issued; and that, upon the final hearing, the injunction and restraining order be made perpetual. The temporary restraining order was issued in accordance with the prayer of the complaint, and a summons and citation were served on the defendants.

At the hearing of the order to show cause, no answer or pleading was filed by the defendants, and their counsel made the following objection to questions propounded to the plaintiff: "We desire to object to the introduction of any and all evidence upon the part of the plaintiff in this case, upon the following grounds and for the following reasons: Because the complaint in this action does not state a cause of action; because the facts alleged and the allegations contained in this complaint do not entitle the plaintiff to any relief in a court

of equity whatever; and because the facts alleged and allegations contained in this complaint do not entitle the plaintiff in this case to an injunction, temporary or otherwise, or at all." The objection was sustained by the court, and the order to show cause and the temporary restraining order were dissolved and dismissed.

What was the effect of the agreement under which the defendants entered into possession of the Modock claim? The question can be determined without difficulty. The case of *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871, was an "action to perpetually enjoin defendants from extracting and removing gold from the mining claim of plaintiffs," and the court said: "The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine if they saw fit, and to exercise their own discretion whether they worked it or not, did not create the relation of landlord and tenant between them and the plaintiffs. The contract gave to them no greater right and had no more force in law than a verbal contract for the sale of the land would have possessed. Their right under such a contract was not in and to the realty, but to the gold, as personalty, when it should be severed from the land. Had it been in writing, it would have given to defendants merely an incorporeal hereditament, and, being verbal, it operated as a license to them to dig and mine for gold within the specified limits, which license protected them from a charge of trespass while in force, but was liable to revocation at the will of the licensors. There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the

owner. (*Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202; *Funk v. Haldeman*, 53 Pa. St. 229; *Gillette v. Treganza*, 6 Wis. 343; *Grubb v. Bayard*, 2 Wall. Jr. 81, Fed. Cas. No. 5849; *Caldwell v. Fulton*, 31 Pa. St. 483, 72 Am. Dec. 760; *Doe v. Wood*, 2 Barn. & Ald. 719; *Potter v. Mercer*, 53 Cal. 667.) The agreement was revocable at the will of the plaintiffs, and having been by them revoked before suit was brought, plaintiffs were entitled to a recovery."

The authorities cited in the above opinion support the doctrine announced by the court, and we quote from *Riddle v. Brown*, *supra*: "A license merely—a verbal license—is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it. (*Doe v. Wood*, 2 Barn. & Ald. 724; 1 Crabb R. P. 96.) But such a license is revocable at any time, at the pleasure of him who gives it." (See, also, *Lindley on Mines*, 2d ed., sec. 860; *Williams v. Morrison* (C. C.), 32 Fed. 177.)

The respondents made the point that the complaint shows that the appellant has no title to the Modock claim, and that therefore he cannot maintain this action. For the purpose of this hearing the respondents admitted that they were in possession under a license from the appellant, and cannot be permitted to urge this point. Whether tenants or licensees, the respondents may not admit that they hold under the appellant, and at the same time say that as to them he is not the owner.

It appears from the complaint that the defendants are insolvent, and are committing waste and destroying the substance of the estate of the Modock claim, and threaten to continue these wrongful acts, and the plaintiff is entitled to the equitable relief prayed for.

The court erred in refusing to permit plaintiff to introduce testimony to prove the allegations of the complaint. We

recommend that the order appealed from be reversed, and that the case be remanded for further proceedings in conformity with this opinion.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is reversed and the cause remanded.

Reversed and remanded.

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NOYES, ADMINISTRATRIX, RESPONDENT, v. YOUNG ET AL.,
APPELLANTS.

(No. 2,056.)

(Submitted December 21, 1904. Decided March 18, 1905.)

Contracts—Account Stated—Action—Consideration—Pleading and Proof—Statutes—Contingency—Uncertainty—Parties—Administratrix—Complaint—Allegation of Official Capacity—When Unnecessary—Admissions—Judgment—Forbearance to Sue—Evidence—Admissibility—Instructions—Limitations.

Contracts—What may Constitute.

1. An instrument arising from, and based upon, transactions had between the parties at its date, acknowledging an indebtedness, and promising to pay it, is a contract.

Accounts Stated—Agreements—Past Transactions—Conclusive Between Parties.

2. An instrument which is the result of an agreement relating to past transactions, acknowledging an indebtedness and promising to pay it, is, in effect, an account stated, on which an action may be based, and, in the absence of fraud, error or mistake in its execution, specifically alleged in the answer is conclusive between the parties.

Action on Contract—Consideration—Presumptions—Burden of Proof.

3. Under Civil Code, sections 2169 and 2170, providing that a written instrument is presumptive evidence of a consideration, and that the burden of showing its want lies with the attacking party, in an action on an instrument acknowledging an indebtedness and promising to pay it, a consideration need not be averred or proven independently of the proof of the contract itself.

Action on Contract—Contingency—Uncertainty.

4. In an action on an instrument acknowledging an indebtedness, and promising to pay it on the happening of a certain contingency,

the actual occurrence of the contingency renders untenable a contention that the contract is void for uncertainty.

Contracts—Merger of Oral into Written Contract—Consideration—Liability.

5. A promisor may bind himself by merging an oral agreement into a written contract, and he cannot escape liability merely because the consideration had passed to him prior to the execution of the written contract.

Administrators—Allegation of Official Capacity—When Unnecessary.

6. Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is required.

Nonsuit—When Properly Overruled—Contracts—Pleadings.

7. A motion for nonsuit was properly overruled where, in an action on an instrument acknowledging an indebtedness and promising to pay it on the happening of a certain contingency, the answer admitted the execution of the instrument, its assignment to the plaintiff, the happening of the contingency, and nonpayment.

Contracts—Forbearance to Sue—Consideration—Sufficiency.

8. Forbearance to sue is a sufficient consideration to sustain a written contract.

Parol Evidence—Contracts—Consideration—Forbearance to Sue.

9. Parol evidence is admissible to show that the consideration for a written contract was forbearance to sue.

Contracts—Consideration—Forbearance to Sue—Instructions.

10. Where a sister of a decedent makes a claim in behalf of the decedent's estate, and her right to recover was disputed by the alleged debtor, the settlement of the claim, or the agreement to forbear suing thereon, was a sufficient consideration for the execution of a contract between the sister and the alleged debtor, and in an action thereon it was not necessary to determine whether the sister, decedent's father and mother surviving, could have successfully maintained the claim against the alleged debtor, and an instruction to that effect was properly refused.

Contracts—Contingency—Limitations.

11. Where a contract was made to become due on the happening of a certain contingency, a suit brought within eight years after the happening of the contingency, but more than eight years from the date of the execution of the contract, was not barred.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by John Noyes against W. H. Young and others. The death of the plaintiff being suggested, the court ordered Elmira Noyes, administratrix of his estate, substituted as plaintiff. From a judgment for plaintiff and an order denying their motion for a new trial, defendants appeal. Affirmed.

Mr. W. A. Clark, Mr. John L. Templeman and Mr. M. P. Gilchrist, for Appellants.

Plaintiff must allege the capacity in which she sues when suit is brought to collect the debts due the estate of a deceased person. The defendants certainly should have the right to know that the plaintiff has a right to receive the moneys sought to be recovered in the suit so that they will be protected from another demand or suit based upon the same claim. (*Hayes v. Hathorn*, 74 N. Y. 486, and cases cited; Phillips' Code Pleading, 314.) "Where the consideration is the maker's debt to the decedent, it will not support a note made to his widow, or even to his personal representative, if the debt did not pass to such representative." (7 Cyc. 700, citing a number of cases.)

Although there be an express promise or covenant, as in the case at bar, yet an executed or past consideration without more will not support an express promise to pay beyond the limits of the promise, which, in its absence, would have been implied by law; and consequently an action cannot be maintained which, on the ground of an express undertaking to that effect, upheld by a past consideration, seeks to impose a liability which would not have arisen out of the consideration itself. The leading English authority upon this proposition is *Hopkins v. Logan* (1839), 5 Mees. & W. 241. (See, also, *Roscorla v. Thomas* (1841), 3 Q. B. 234; *Lattemore v. Gerrard* (1848), 1 Ex. Rep. 809; *Granger v. Collins* (1840), 6 Mees. & W. 458; *Brown v. Crump* (1815), 1 Marsh. 567; *Jackson v. Cobban* (1841), 8 Mees. & W. 790; *Kaye v. Dutton* (1844), 49 Eng. Com. Law Rep. 807; *McManus v. Bark* (1870), 5 Ex. 65. See note to *Lampleigh v. Brathwaite*, 1 Smith's Lead. Cas. 8th ed., *163.) The case of *Hopkins v. Logan*, *supra*, has been followed in this country. (*Russell v. Buck* (1839), 11 Vert. 139; *Farrington v. Bullard* (1863), 40 Barb. (N. Y.) 512; *Hunt v. Knox* (1857), 34 Miss. 476, 69 Am. Dec. 397; *Esterly Harvesting Machine Co. v. Pringle* (1894), 41 Neb. 265, 59 N. W. 804; *Austin etc. Co. v. Bahn* (1895), 87 Tex. 582, 29 S. W. 646, 30 S. W. 430; *Gilmore v. Green* (1879), 14 Bush (Ky.), 772; *Ogden v. Redd* (1877), 13

Bush (Ky.), 581; *Fair v. Mevey* (1898), 28 Civ. Proc. 245, 56 N. Y. Supp. 414; *Pfeiffer v. Campbell* (1889), 111 N. Y. 631, 19 N. E. 498; *Robins v. Downey* (1892), 45 N. Y. St. Rep. 279, 18 N. Y. Supp. 100; *Walker v. Russell* (1835), 34 Mass. 280.)

The written instrument as it stands is also void for uncertainty because the happening of the contingency upon which the payment depends lies wholly with the promisor, the defendant Young. (*Steward v. Trustees* (1845), 2 Denio, 403.)

A promise to forbear and an actual forbearance, in consideration of what one is already legally bound to do, is no consideration for that forbearance. (*Hoffman v. Coombs*, 9 Gill (Md.), 284; *Turnbull v. Brock*, 31 Ohio St. 649; *Pfeiffer v. Campbell*, 111 N. Y. 631, 19 N. E. 498; *Holmes v. Boyd*, 90 Ind. 332; *Stuber v. Schnack*, 83 Ill. 191; *Planter etc. Co. v. Sellman*, 2 Gill & J. (Md.) 230; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Henry v. Gilliland*, 2 N. E. 360.) If the promise of one party is the consideration for the promise of the other, the promise must be concurrent and obligatory on both at the same time, and the declaration should so allege. (Ency. of Pl. & Pr. vol. 4, p. 931, citing many cases.) In declaring on a promise made on a consideration of forbearance, the plaintiff must prove the forbearance. (*Edward v. Bough*, 11 Mees. & W. 641, and citing a number of cases.) "If plaintiff alleges a particular consideration for a promissory note, the burden is on him to prove it as alleged, if it is denied." (*James v. Hayden*, 10 Ky. Law Rep. 534, citing a number of cases.)

Contemporaneous promises of forbearance are not admissible to contradict the terms of a written agreement. (*Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30; *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92; *Nelson v. Spears*, 16 Mont. 351, 40 Pac. 786.)

In an action on an account stated, it is not necessary to prove the account, or its items, but the proof in such case must

be directed to the fact, if it is in issue, that the parties have accounted together and agreed upon the balance due, and in order to support the count upon an account stated the plaintiff must show that there was a demand upon his side which was acceded to by the defendant. There must be a fixed and certain sum admitted to be due. The admission must have reference to past transactions, that is, to a substituted debt, or to a moral obligation founded upon an extinguished obligation to pay a certain sum. (*Auzerais v. Nagle*, 74 Cal. 60, 15 Pac. 371.) When the action is on an account stated, to maintain such an action the plaintiff must prove the account stated, as that and nothing else will support his allegations. (*Truman v. Owen*, 17 Or. 523, 21 Pac. 665.)

To prove an account stated, it must appear from the evidence that there were dealings between the parties before the alleged statement of account, but the specific items constituting an account need not be shown. (*Powers v. New England Fire Ins. Co.*, 68 Vt. 390, 35 Atl. 331; *Quincy v. White*, 63 N. Y. 370; *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829; *Stevens v. Tuller*, 4 Mich. 387.) An account stated determines the amount of the debt when liability does exist. It cannot be made an instrument to create a liability when none existed before. (*Austin v. Wilson*, 33 N. Y. 503, 11 N. Y. Supp. 565, 33 N. Y. St. Rep. 503.) An account stated must relate to some previous transactions. The relation of debtor and creditor must have already existed. (*Truman v. Owen*, 17 Or. 523, 21 Pac. 665; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.) It is necessary to prove the assent of both parties to the account stated. All facts and circumstances may be shown that will aid in deciding what occurred, or explain what occurred, at the settlement of account. (*Mead v. White* (Pa.), 8 Atl. 913; *Goodrich v. Coffin*, 83 Me. 324, 22 Atl. 217; *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504.) The burden of proving the account stated is on him who pleads it. (*Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *McClellan v. Crofton*, 6 Me. 307.) Conditions precedent and subsequent

must be proved, and they must be alleged if not recited in the written instrument. (*Moore v. Waddle*, 34 Cal. 147.)

It is necessary to allege the occurrence of the contingencies and that a fund arose therefrom out of which to pay the amount due upon the contingencies, and if the allegations are denied by the answer and issue is thereby created, proof is required on the part of plaintiff in order to entitle him to recover. (*De Wein v. Osborn*, 12 Colo. 407, 21 Pac. 189; *Ency. of Pl. & Pr.*, vol. 4, p. 645, citing *Wilson v. Clark*, 20 Minn. 367; *Fox v. Pullman Car Co.*, 16 Mo. App. 122; *Rodgers v. Cody*, 8 Cal. 324; *Murdock v. Caldwell*, 8 Mass. 309.)

Messrs. Forbis & Mattison, Mr. M. J. Cavanaugh, and Messrs. Forbis & Evans, for Respondent.

The contract being in writing, the law presumes a consideration, and therefore it is only necessary to allege the contract, and all allegations of antecedent considerations are surplusage, and are at best, and only, inducements. The action is not founded upon them; they are not essentials, and cannot be traversed for the purpose of requiring the plaintiff to prove them in the first instance. (*Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089.) In *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965, matters of inducement were set up much the same as in the case at bar, and the court held it was not necessary to allege a consideration for any contract in writing. (*Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130.)

Plaintiffs were only required to set forth the contract without alleging consideration, and if no affirmative defense were made that recovery followed as a matter of course. It follows as a logical conclusion, that the lack of consideration is an affirmative defense which must be set up and proved by defendant, and the burden of proof falls upon him, under section 2170, Civil Code. The provision of that section is applicable alike to the case where the sufficiency of the consideration is alleged in the complaint, and denied in the answer, or where the want of consideration is alleged in the answer and denied

in the replication. (*Poirier v. Graval*, 88 Cal. 79, 25 Pac. 962; *Gebhart v. Francis*, 32 Pa. St. 78; *Abbott's Trial Brief Pleadings*, vol. 2, p. 902; *Murray v. New York Ins. Co.*, 85 N. Y. 236; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226, 13 N. E. 604; *Wormouth v. Hatch*, 33 Cal. 121; *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; 4 *Ency. of Pl. & Pr.* 944-950.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This action was brought by John Noyes, who died pending suit, and Elmira Noyes, administratrix of his estate, was by order of court substituted as the plaintiff. The appeal is from a judgment and the order overruling a motion for a new trial.

The plaintiff alleges: That defendant Young was justly indebted to one Orlena E. Price in a sum exceeding \$5,000 for moneys had and received by said defendant for the use and benefit of Orlena E. Price. That said defendant and Orlena E. Price, by a mutual agreement, settled and compromised the said indebtedness then existing, and by said mutual agreement and compromise the amount of the said indebtedness between the parties was fixed at the sum of \$5,000, which sum Young agreed to pay to said Orlena E. Price. That she had made demand therefor, but that Young had not paid the same. That she threatened to and was about to commence an action against Young to recover of him this amount. That on the 19th day of March, 1888, the defendant Young executed and delivered to the plaintiff his agreement as follows:

"In consideration of my being justly indebted to Orlena E. Price, in the sum of five thousand dollars, I, William H. Young, of Butte, Silver Bow County, Mt., do hereby agree that in the event of my selling or otherwise disposing of the 'Cora' lode claim, situated in Summit Valley Mining District, Silver Pow County, Montana, or any interest in said lode claim for cash, or for any consideration other than a corporate stock consideration, I will upon so selling or disposing of such

property, pay to Orlena E. Price, the sum of five thousand dollars—Provided, that in the event of my giving a bond for a deed upon such property, such bonding shall not be construed as a disposing of such property, unless I should receive a payment or payments, upon such bond, in which event I agree to pay 50% of the amount of such payment so received, to the said Orlena E. Price, to be applied by her upon the said \$5,000.00 indebtedness, until such time as said indebtedness is fully paid. Provided, further, that in the event of my leasing the said property, 50% of the royalty or rent received for the property so leased shall be applied by me in payment of said \$5,000.00 indebtedness, until the said indebtedness is fully paid. Should I convey any interest in the said Lode Claim to a corporation and stock of such corporation be issued in payment for such interest so conveyed I do hereby agree thereupon to transfer to the said Orlena E. Price stock of such corporation to the value of five thousand dollars, to be valued at the market value of such stock.

“Dated this 19th day of March, A. D. 1888.

[Signed] “W. H. YOUNG.

“For valuable consideration we hereby assign the within to John Noyes.

“ORLENA E. PRICE.

“JOHN W. PRICE.

“Aug. 20th, 1888.

“Duly verified.

“Endorsed: Filed, June 29, 1901.”

That the consideration for said agreement was the promise on the part of Orlena E. Price to refrain from and forbear bringing suit to recover said indebtedness; that Orlena E. Price afterward, for a valuable consideration, sold, assigned, transferred and set over to the plaintiff, John Noyes, this agreement; that the contingency named in the agreement had happened; that Young had not paid the sum of \$5,000 or any part thereof; and that the same was then due.

The defendant admitted the execution of this contract; admitted the assignment to Noyes; admitted the happening of

the contingency; admitted that he had not paid the sum named therein or any amount thereof; denied that there was any promise to forbear suing; denied that there was any consideration for the contract whatsoever; and alleged that at the time of the execution of the contract he was the owner of an interest in the Cora lode claim; that Orlena E. Price represented to him that she had sold or could sell said claim to one Conrad for the sum of \$60,000; and that the \$5,000 named in the contract was the amount of the commission which would be due to Orlena E. Price in the event she made the sale of the property to Conrad, but that such sale was never made, and that there was, therefore, no consideration for the contract. Defendant also alleged that action on the contract was barred by the statute of limitations. It appears from the evidence on the part of plaintiff that the contract on which the action is founded grew out of a claim made by Orlena E. Price against defendant Young on account of money and property belonging to her deceased brother's estate, which she claimed was converted by Young.

The case was tried before a jury, and a verdict rendered in favor of the plaintiff. Judgment was entered thereon against defendant Young, the action as to all the other defendants having been dismissed. From this judgment and an order overruling defendant's motion for a new trial this appeal is taken.

Plaintiff submitted her case upon the admissions contained in the separate answer of defendant Young, and rested her case in chief upon these admissions. Defendant then moved for a nonsuit upon the grounds: 1. That the contract sued on was void for want of consideration, want of mutuality, and was uncertain; was merely evidence of an account stated. 2. That plaintiff pleads a forbearance to sue as a consideration; that this is denied by the defendant, and that no evidence was offered to sustain this allegation of the complaint; that the admissions in defendant's answer are immaterial, in that they in no way constitute, tend to constitute, or make out

a cause of action for the plaintiff. This motion for nonsuit was overruled.

Viewing the instrument on which the action is based, we find a positive, unequivocal written admission of indebtedness on the part of appellant payable to Orlena E. Price; the specification of several contingencies, upon the happening of any one of which the sum admitted, or some part of it, would become due; and a statement as to the manner in which payments were to be made. If this instrument arises from and is based upon transactions had between the parties at its date, it is as purely a contract as is a promissory note that became due on the happening of a contingency, for it acknowledges an indebtedness, and promises to pay it. If it is the result of an agreement relating to past transactions, it is, in effect, an account stated, and as such is a contract on which an action may be based.

“‘From an account stated the law implies a promise to pay whatever balance is thus acknowledged to be due.’ (*Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171.) It is not necessary that there should be an express promise to pay. * * * On the contrary, there is an implied promise in law on the part of him against whom the balance is found to pay, and action is maintainable thereon. (*Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549. See, also, *Stagg & Conrad v. St. Jean*, 29 Mont. 288, 74 Pac. 740; *Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427.) In the *Martin Case*, Chief Justice Brantly, speaking for the court, uses this language: “An account stated is an agreement between the parties, either express or implied, that all the items are correct. [Citing cases.] The action is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract. This contract is the cause of action, and the plaintiff must recover upon it, or fail in the action. [Citing cases.] It is therefore not necessary, nor is it permissible, to prove the items of the original account. They may not be inquired into or surcharged, except upon the ground of fraud,

error or mistake in the ascertainment of the balance [citing cases], and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer." To the same effect is the decision in *Johnson v. Tyng*, 37 N. Y. Supp. 516, 1 App. Div. 610. There is no allegation in this answer that there was any fraud, error or mistake in the execution of this contract.

A written instrument is presumptive evidence of a consideration, and the burden of showing want of consideration lies with the attacking party (sections 2169, 2170, Civil Code), and no consideration need be averred in the complaint. (*Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089.) This action is based upon the contract, not upon antecedent matters. The contract imports a consideration, and none need be averred or proven independently of the proof of the contract itself, and, if averred, it can have no greater effect than to narrow the issue.

Murray v. New York Life Ins. Co., 85 N. Y. 236, was an action to recover upon two life insurance policies. The complaint alleged, among other things, that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the policies. The defendant, it appears, had admitted the issuance of the policies, their non-payment, and the death of the insured, and relied upon an affirmative defense, claiming thereby the right to open and close the case. The court referred to this allegation in the complaint, and said: "This allegation was not required, and all that was essential to make out a cause of action was a statement of the contract, the death of the assured, and the failure to pay as provided. The insertion of an unnecessary allegation in the complaint, which the plaintiff was not required to aver or to prove in order to establish his case, could not and did not deprive the defendant of his right to the affirmative, if such right actually existed. As the allegation referred to was not properly there for the purpose of making out a good

cause of action, the complaint must be regarded as if it contained no such averment." (*Wormouth v. Hatch*, 33 Cal. 121; *Gebhart v. Francis*, 32 Pa. St. 78; vol. 2, Abbott's Trial Brief, 902; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226, 13 N. E. 604.)

It is also claimed that the contract is void for uncertainty because the happening of the contingency upon which the payment depends lies wholly with the promisor, the defendant Young. No such question arises in this case, because here the contingency did happen. Had the defendant prevented the contingency from happening, and plaintiff had brought suit alleging bad faith on the part of the defendant, the question would then be presented. A contingency cannot be called uncertain when it has actually occurred.

It is further claimed that, if the defendant was indebted to Orlena E. Price, he was bound to pay that indebtedness, and that his promise so to do was not a sufficient consideration for this contract. One may not claim an advantage by merely agreeing to do that which he is already legally bound to do; but this does not prevent him from binding himself by merging an oral agreement into a written contract, nor does it enable him to escape the written contract merely because the consideration had passed to him prior to the execution of such contract.

It is also claimed that the official capacity of plaintiff is not alleged in the complaint. It appears, however, that after the action was commenced the death of the plaintiff, John Noyes, was suggested, and that this administratrix was substituted as plaintiff by order of the court. Not being made a party by the action of the parties, but by the order of the court, no allegation was required.

In this action the plaintiff was required to prove but four things in order to establish her case in chief, viz.: 1. The execution of the contract sued upon; 2. The assignment of that contract to John Noyes; 3. The happening of the contingency upon which payment depended; 4. Nonpayment by

defendant. All these matters were admitted by the answer of defendant Young. Nothing remained for plaintiff to prove as a part of her case in chief, and the court did not err in overruling this motion for nonsuit.

It is further claimed by the appellant that the court should not have permitted plaintiff to introduce evidence to the effect that the consideration, or at least a part of the consideration, for the written instrument sued upon, was a forbearance to sue the defendant Young. The defendant, in addition to denying that this was a consideration for the contract, alleged that the only consideration for that instrument was the commission which would be due to Orlena E. Price in the event that she made a sale of the mining claim to one J. H. Conrad for the sum of \$60,000; that Orlena E. Price had represented to the defendant that she had, at the time the contract was entered into, practically consummated the deal, and that on the strength of this representation the defendant acknowledged himself indebted to her in the sum of \$5,000. The defendant introduced evidence tending to prove that there was no forbearance, and that this commission should be due only in the event that the sale was consummated by Orlena E. Price to Conrad; that the sale never was consummated, and that there was, therefore, no consideration for the contract. The plaintiff introduced evidence in rebuttal, over the objection of defendant, that this forbearance was a part of the consideration of the contract. Appellant alleges that this is error, on the ground that "no word, phrase, or sentence of the agreement suggested the slightest idea of even a contemplated thought of forbearance," and that it was a mere verbal contemporaneous promise to forbear, and proof thereof could not be admitted, for it would tend to contradict the terms of the written instrument. This contract does not contain any reference to forbearance, and it is equally silent as to a commission. If the consideration for the contract cannot be inquired into, the defendant could not be permitted to allege or prove that there was any want of consideration; but it is well-settled law that the con-

sideration for any written agreement may be inquired into under proper allegations in the pleadings. It is equally well settled that forbearance to sue is a sufficient consideration to sustain a written contract, and there was no error in the admission of this rebuttal evidence. (*Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005; 9 Cyc. 338; 1 Current Law, 631; 6 Am. & Eng. Ency of Law, 711, 713, 743.)

Appellant further complains of certain instructions given, as well as the refusal of the court to give certain other instructions requested by the defendant. Practically all the questions raised by the appellant with reference to these instructions have been already considered, and but one will be specially noticed. The defendant requested the court to instruct the jury that, if it believed that the brother of Orlena E. Price died intestate, leaving surviving him his father and mother, that his sister, Orlena E. Price, was not his heir at law. Instruction No. 4 given by the court is as follows: "The settlement of the disputed claim, or the agreement to forbear suing upon such a claim, is a sufficient consideration for the execution of a contract such as that sued on in this action, and it is not necessary to determine whether such claim could have been successfully maintained under the facts. If such claim was being urged by Orlena E. Price against said defendant Young, and he, for the purpose of settling the same, executed the agreement in question, then you cannot consider anything further, but must find for the plaintiff." This instruction correctly states the law, and disposes of the contention made by the appellant that his requested instruction should have been given.

The appellant also contends that more than eight years elapsed from the date of the execution of the contract and the commencement of the action; that the claim was therefore barred by the statute of limitations. It appears, however, that the contingency on which payment depended happened within eight years prior to the commencement of the action, and the

statute of limitations did not commence to run until the plaintiff could maintain an action on the contract.

We think this judgment and order should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

Affirmed.

Rehearing denied, April 11, 1905.

FORRESTER AND MACGINNISS, PLAINTIFFS; THOMAS R. HINDS, RESPONDENT, v. BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY ET AL., APPELLANTS.

(No. 1,697.)

(Submitted April 30, 1904. Decided March 18, 1905.)

ON MOTION FOR REHEARING.

MOTION denied. For original opinion, see 30 Mont. 181.

Receivers—Compensation—For What Period—Law of the Case.

1. Where a receiver's appointment was valid, and the supreme court on a former appeal held that he should be retained pending the appeal, unless the district court otherwise ordered, and, in ordering the discharge of the receiver, reversed the order of appointment without prejudice to the receiver's right to be reimbursed out of the trust estate for any amounts he may have properly expended or become liable to pay, and to be compensated for his services, such decision constituted the law of the case, and entitled the receiver to payment for services for the time he was actually engaged in efforts to obey the directions of the district court, when not stayed by the supreme court, and for services when actually in possession of the property, together with a nominal amount for the time during which his efforts were stayed, and for the time he was in office after he turned the property back to the owners, notwithstanding he should have been discharged on a former date, when defendant offered in writing to comply with plaintiff's demands in the suit in which the receiver was appointed.

MR. JUSTICE MILBURN delivered the opinion of the court.

This case has come before us on motion for rehearing, the former opinion appearing in 30 Mont. 181, 76 Pac. 2.

After consideration of the motion for rehearing the same is denied, a rehearing not being necessary. But of our own motion we have taken the case up for reconsideration, and we have concluded that the decision and opinion rendered after the original hearing, and referred to above, should be modified. The only point in the motion for rehearing worthy of consideration is that made as to the compensation of the receiver.

In the former opinion we said: "Inasmuch as the receiver should have been, in justice, discharged certainly as early as April 5, 1898 [1899], when the defendants offered, in writing, to do the very things that the plaintiffs prayed to have done by decree of court, we hold that he may be compensated in a reasonable sum for services rendered by him prior to said last-mentioned date, and be reimbursed for all proper and reasonable expenses incurred prior thereto, and that he receive nothing and be allowed nothing for any services or expenses alleged to have been rendered or incurred after that date out of the property of the defendants, excepting, possibly, a reasonable sum for the services of a bookkeeper aiding in rendition of accounts to the court." After further consultation, we conclude that the position of the receiver is correct in part. As he says, and as we say in the first opinion herein, the appointment of the receiver was, in 1900, held by this court to be valid. He was lawfully and properly appointed. If the defendants had not done the things complained of by the plaintiffs, then the receiver would not have been asked for, and any action of the court would not have been needed. The receiver entered upon the performance of his duties on December 15, 1898, and was such officer of the court until this court, on June 8, 1900, reversed the order of the district court of April 10, 1899, denying defendants' motion to vacate the order appoint-

ing the receiver. He was in possession of the property only from the 8th to the 13th, inclusive, of April, 1899. He was, prior to the 8th of April, making some effort to perform his duty, being stayed most of the time by the order of this court. After April 13, 1899, until his discharge as a result of our decision of June 8, 1900, *supra*, he did not and could not do anything, or have any responsibility resting upon him, not having any property in his hands. He should not be deprived of compensation because the defendants had done or offered to do equity upon April 5, 1899.

The district court erred, it is true, in not discharging him when the defendants remedied the evils complained of in the complaint of plaintiffs; but the appointment was valid, and he was retained in office, this court, wrongly or rightly, having said (*Forrester v. Boston & Montana etc. Min. Co.*, 56 Pac. 868, 22 Mont. 430) that "the receiver should be retained pending this appeal, unless the district court otherwise orders." He was lawfully in possession. Later the property, upon the execution of a bond, was surrendered April 13, 1899, by the order of our court, to the defendants. This court, when ordering the discharge of the receiver (*Forrester et al. v. Boston & Montana etc. Min. Co.*, 24 Mont. 153, 61 Pac. 309), said: "The order refusing to vacate the order of December 15, 1898, is reversed, and the cause is remanded, with directions to the district court to render and cause to be entered a judgment and decree in favor of the plaintiffs and against the defendants in conformity to the offer made, and thereupon forthwith to vacate or discharge the order appealed from, such vacation or discharge to take effect as of the date of such judgment so to be rendered and entered, but without prejudice to any right of the receiver to be reimbursed out of the trust estate for any amounts he may have properly expended or become liable to pay, and to be compensated for his services."

This court having declared and adjudged that the receiver had been lawfully appointed, and he having been lawfully in

office until discharged, in accordance with the order of this court of June, 1900, we must admit that on account of the law of this case as formerly settled we were in error in holding, as we did, that he should not be paid out of the property of the defendants, or by them, for any services rendered after April 5, 1899, the day when he should have been discharged on account of the defendants having complied with the demands of the plaintiffs. He should be paid a reasonable sum for his services for the time when he was actively engaged in efforts to obey the directions of the district court, when not stayed by this court, and for his services when actually in possession of the property for the six days, and a nominal amount for the time when stayed, and a nominal sum for the time he was in office after the 13th day of April, 1899, when he turned the property all back to the owners. The amount due him is chargeable, under the law of this case, to the defendants. In determining how much is due to the receiver, the court will find out how much he did which it was his duty to do, and how well he did it. Thus we briefly state or summarize what is said in *Hickey et al. v. Parrot Silver & Copper Co.*, 32 Mont. 143, 79 Pac. 698, as to what the court should consider in fixing compensation of the receiver.

All that is said in the opinion on the original hearing herein, and not modified hereby, is affirmed. The motion is denied, and the cause is remanded, with directions to the district court to proceed in accordance with the views herein, and heretofore in the original opinion, expressed.

Motion denied and cause remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I dissent. At the time the original decision in this case was rendered I was of the opinion, as expressed in my separate opinion then delivered, that the record contains sufficient evidence to enable this court to proceed and determine the only controversy involved here, under the provisions of section 21 of the Code of Civil Procedure, as amended

by an Act of the Second Extraordinary Session of the Eighth Legislative Assembly, approved December 10, 1903. I am still of that opinion, and therefore do not agree with the majority of the court in the disposition which should be made of this case.

TRERISE, RESPONDENT, v. BOTTEGO, HODGENS ET AL.,
DEFENDANTS; HODGENS, APPELLANT.

(No. 2,059.)

(Submitted December 22, 1904. Decided March 20, 1905.)

Mortgages—Record—Certificate of Acknowledgment—Sufficiency—Civil—Clerical Error.

1. Under Civil Code, sections 1640, 1641, providing for the recording of deeds, and making them constructive notice to subsequent purchasers, and section 4667, declaring that every person who has actual notice sufficient to put him on inquiry has constructive notice of the fact itself, if by inquiry he might have learned such fact, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that, in the statement that the parties "severally acknowledged —he— executed the same," the blanks before and after the word "he" were not filled so as to make the word "they."

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Emma Trerise against Mary H. Bottego, Thomas M. Hodgins, and others. From a judgment for plaintiff and an order overruling his motion for a new trial, defendant Hodgins appeals. Affirmed.

Messrs. McBride & McBride, for Appellant.

Constructive notice from the record, being dependent upon purely statutory provisions, it naturally follows that such effect will not be given to any and every recorded instrument, but only to such as fall within the statute. If an instrument has not been executed or acknowledged in the manner provided by

law, to entitle it to record, then its record will be a mere nullity and will not operate to give constructive notice. (Ency. of Law, vol. 24, p. 142; Ency. of Law, vol. 1, pp. 489, 490.) Without an acknowledgment, or with one that is defective, the record of the deed is unauthorized, and is not constructive notice. (Jones on Law of Real Property, vol. 2, par. 1442; *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Reid v. Kleyensteuber et al.* (Ariz.), 60 Pac. 879; *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732.)

Where the use of the seal is required, an instrument purporting to be a mortgage, but not executed under seal, is not entitled to be recorded, and if it be copied in the records, it does not impart notice to subsequent purchasers or encumbrancers. (Jones on Conveyances, vol. 2, par. 1439; *Recouilat v. Sansevain*, 32 Cal. 376; *Arthur v. Screven*, 39 S. O. 77, 17 S. E. 640.) If a statute requires the officer taking the acknowledgment to certify the same under his seal, a certificate not under seal is not sufficient to admit the deed to record, and the record of such deed is not notice of it. (Jones on Conveyances, vol. 2, p. 329; *Buell v. Irvin*, 24 Mich. 150; *Hayden v. Westcott*, 11 Conn. 129; *Hall v. Redson*, 10 Mich. 23.) If there is anything whatever in the way of an acknowledgment attached to the mortgage in question, it is clearly and only the acknowledgment of John B. Bottego, a stranger to the title. (*Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 742.)

The defect in the acknowledgment could not be corrected upon the trial of the case at bar by parol testimony, and it would be clearly an evasion of the law, relative to recording, to permit an acknowledgment to be shown by such testimony, after the rights of an innocent purchaser for value have attached. (*Hayden v. Westcott*, 11 Conn. 129; Ency. of Ev., vol. 1, p. 196.)

Mr. J. L. Wines, Mr. O. J. Saville, and Mrs. Ella K. Haskell, for Respondent.

The mortgage, the subject of the action, being recorded, gave constructive notice to the subsequent purchaser, the appellant here. (Civil Code, secs. 1640, 4667; Code of Civil Proc., sec. 3465.) Under the statutes of Montana pertaining to conveyances, no subscribing witnesses are required to a deed when the same is properly acknowledged. A deed may be entitled to record by proof of witnesses without acknowledgment. When by either method it is once recorded, it is good notice to third parties. (*Belk v. Meagher et al.*, 3 Mont. 65; approved in *Middle Creek Ditch Co. v. Henry*, 15 Mont. 579, 39 Pac. 1054.) One knows what he sees is the copy of an instrument purporting to have been made by the grantor to the grantee. Good faith requires that he shall prosecute further inquiry, and, if he negligently or willfully neglects to do so, he is held to have known all the facts to which that inquiry would have led. (*Woods v. Garnett*, 72 Miss. 78, 16 South. 390.) Courts will refer to the body of an instrument to support a defective acknowledgment. (*Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24 South. 582; *Madden v. Floyd*, 69 Ala. 221; *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. 513; *Chandler v. Spear*, 22 Vt. 388; *Phillips v. Ruble*, 16 Ky. 221; *Wise v. Postlewait*, 3 W. Va. 452; *Northwestern etc. H. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, 765; Am. & Eng. Ency. of Law, vol. 1, 546; *Carpenter v. Dexter*, 8 Wall. 513; *Nelson v. Graff*, 44 Mich. 434, 6 N. W. 872; *Chase v. Whiting*, 30 Wis. 544; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618, 14 S. W. 175; *Gregory v. Kenyon*, 34 Neb. 640, 52 N. W. 685; Brewster on Conveyancing, sec. 267.) Where words have been omitted by an evident clerical error, they may be supplied by intendment after an inspection of the certificate in connection with the deed. (*Basshor v. Stewart*, 54 Md. 376; Brewster on Conveyancing, sec. 267; *Magness v. Arnold*, 31 Ark. 103; *Sanford v. Bulkley*, 30 Conn. 344; *Milner v. Nelson*, 86 Iowa, 452, 41 Am. St. Rep. 506, 53 N. W. 405; *Picket v. Doe*, 5 Smedes & M. 470, 43 Am. Dec. 523; *Wilcoxson v. Osborn*, 77 Mo. 621; *Livingston v. Kettelle*, 6 Ill. 116; *Donahue v.*

Mills, 41 Ark. 421; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Schley v. Car Co.*, 120 U.S. 575, 7 Sup. Ct. Rep. 730.) Where one word is inserted for another through clerical error, the certificate is sufficient. (*Broussard v. Dull*, 3 Tex. Civ. App. 59, 21 S. W. 937; *Calumet & Chicago etc. Co. v. Russell*, 68 Ill. 426; *Gorman v. Staunton*, 5 Mo. App. 585; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388.)

MR. COMMISSIONER BLAKE prepared the opinion for the court:

This is an appeal by Thomas M. Hodgins from a judgment and order overruling his motion for a new trial. There is no controversy about the facts, and only one question is presented for decision.

Mary H. Bottego owned real property in the county of Silver Bow, and made a mortgage thereon, January 24, 1898, to J. H. Trerise, to secure the payment of a promissory note and interest. Her husband, John B. Bottego, signed the note and mortgage. The mortgage is in the usual form, and the acknowledgment is as follows:

"State of Montana, }
"County of Silver Bow. } ss.

"On this Twenty-fifth day of January, 1898, before me I. C. Bachelor, a Notary Public in and for the County of Silver Bow, State of Montana, personally appeared Mary H. Bottego and John B. Bottego (Her Husband) known to me to be the persons described in, and who executed the foregoing instrument, and who severally acknowledged to me that —he— executed the same. In Testimony Whereof, I have hereunto subscribed my hand and affixed my Notarial Seal on the day and year in this certificate above written.

[Seal]

"I. C. BACHELOR,

"Notary Public in and for Silver Bow County, Montana."

The above word "he" is printed in the blank that was used by the officer taking the acknowledgment, and there is a suffi-

cient space for letters to be written before and after it. The mortgage was filed for record January 26, 1898, in the office of the county recorder of said county, and Trerise assigned the note and mortgage February 1, 1900, to the plaintiff. The property was transferred May 15, 1900, to defendants John J. Ferrell and Fred M. Ferrell, who conveyed the same April 15, 1901, to Hodgens, and his deed was recorded April 24, 1901. This action was commenced April 28, 1902, to foreclose the mortgage, and Hodgens answered for himself alone. The other defendants made no defense. A decree was made and entered for the foreclosure of the mortgage according to its terms, and Hodgens appealed.

It is the contention of the appellant that the certificate of the acknowledgment does not comply with the statute, and is a nullity; that the county recorder had no authority to record the mortgage; and that the property was purchased without notice of the encumbrance.

The law applicable to constructive notice is defined in the following provisions of the Codes: "Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." (Section 1640, Civil Code.) "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." (Section 1641, Civil Code.) One section appears in two Codes: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself, in all cases in which, by prosecuting such inquiry, he might have learned such facts." (Section 4667, Civil Code, and section 3465, Code of Civil Procedure.) This section embodies an

old rule of chancery. Another section has been incorporated in two Codes: "Notice is: 1. Actual—which consists in express information of a fact; 2. Constructive—which is imputed by law." (Section 4666, Civil Code, and section 3464, Code of Civil Procedure.) These provisions with respect to notice must be construed together.

Did the omission in the certificate of the acknowledgment render the instrument void as to appellant? This subject is discussed in *McCardia v. Billings*, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729. A mortgage was given upon land by Mrs. McCardia and her husband, and the acknowledgment is as follows:

"Territory of Dakota, }
"County of Pembina. } ss.

"On this 10th day of October, in the year one thousand eight hundred and eighty-four, before me, John V. McIntire, a notary public in and for said county and territory, personally appeared William McCardia and Margaret McCardia, known to me to be the person who are described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

[Notarial Seal]

"JOHN V. MCINTIRE,
"Notary Public, Dakota Territory."

On the trial the introduction of the mortgage in evidence was objected to on the ground that the acknowledgment did not comply with the statute, and that the instrument was not entitled to be recorded. The court said: "It must be conceded that, if the acknowledgment of the mortgage was so defective that it would not have entitled the mortgage to be recorded in the office of the register of deeds, then the certificate of the acknowledgment alone would not be any evidence of the execution of the mortgage. * * * It is also true that the certificate of acknowledgment must contain a substantial compliance with the statute pertaining to acknowledgments; that is, that the certificate must contain a statement of every fact that

the statute prescribes shall be incorporated therein. * * *

It is also true, as a matter of law, that obvious errors or omissions, clearly appearing upon the face of the certificate to be clerical in their nature, will not invalidate the acknowledgment, and, before the certificate will be held fatally deficient, there must be an absence of some essential fact of a substantial character. * * *

Courts, however, will construe the language of certificates of acknowledgment liberally, and hold them valid if that can be done by a fair and reasonable construction of the language used. Turning now to the acknowledgment of the mortgage in question, we find that it unequivocally appears that William McCardia and Margaret McCardia personally appeared before the notary. The words immediately following their names in the certificate, to wit, 'known to me to be the person,' considered in connection with the words 'who are described in,' show beyond question that the word 'person' refers to William McCardia and Margaret McCardia. If it does not refer to these two grantors, then the verb 'are' obviously would not have been used. The omission of the letter 's' from the word 'person' was obviously a clerical omission. The pronoun 'he' refers to the word 'person' preceding it in the same sentence. It would render the whole sentence useless and meaningless, so far as Margaret McCardia is concerned, to place upon it the construction that she appeared before the notary, and acknowledged that her husband acknowledged the execution of the mortgage. Either that construction must be placed upon it, or we must hold that the word 'he' was not changed to 'they' through a clerical oversight." The court cites *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28, 40 S. W. 628, in which it is decided that a certificate of joint acknowledgment by a married woman and her husband is not vitiated by stating that "he," instead of "they," executed the deed.

In *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426, involving the effect of a certificate of acknowledgment of a deed, Mr.

Justice Field, for the court, said: "In aid of the certificate, reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections."

We are therefore of the opinion that the mortgage was acknowledged substantially in accordance with the provisions of the statutes, *supra*, and that the record thereof imparted constructive notice of its contents to Hodgens.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

Affirmed.

Rehearing denied May 3, 1905.

FRANZMAN, RESPONDENT, v. DAVIES ET AL., APPELLANTS.

32	251
37	305

(No. 2,061.)

(Submitted March 14, 1905. Decided March 22, 1905.)

Appealable Order—Dismissal of Appeal from a Justice's Court—Failure to Demand Judgment—Dismissal of Case.

Appeal from Justice's Court—Dismissal—Nonappealable Order.

1. An order sustaining a motion to dismiss an appeal from a justice's court is not appealable. (Session Laws of 1899, p. 146.)

Appeal from Justice's Court—Failure to Demand Judgment—Dismissal of Case.

2. Where more than six months had elapsed after an order made sustaining a motion to dismiss an appeal from a justice's court, and respondent had neglected to demand and have entered a judgment in accordance with such ruling, as required by Code of Civil Procedure, section 1004, subdivision 6, it was error to deny a motion to dismiss the case and to render judgment dismissing the appeal.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

ACTION by C. V. Franzman, doing business as the Carder Wall Paper Company, against Frank N. Davies, and another, doing business as George J. Davies & Co. From a judgment of the district court dismissing an appeal by defendants from the judgment of a justice, defendants appeal. Reversed.

Mr. O. M. Hall, for Appellants.

Mr. Carl J. Smith, for Respondent.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This action was originally commenced in a justice's court, where a judgment was rendered for plaintiff on December 11, 1902. On December 16th defendants' notice of appeal and undertaking on appeal to the district court were filed; also a transcript fee of \$2.50 and a filing fee of \$5 were paid. On December 20th respondent excepted to the sufficiency of the sureties on the undertaking. On December 26th (the 25th being a nonjudicial day) the appellant deposited a cash bond on appeal in double the amount of the judgment, and on December 29th a transcript on appeal was filed in the district court. On March 7, 1903, respondent filed a motion to dismiss the appeal, for the reasons: "1. That said appeal was not filed in the district court within the time allowed by the rules of this court and the statutes of Montana. 2. For the reason that the sureties on the undertaking on appeal did not justify as required by law, or at all, and that no notice of such justification was ever served on plaintiff or his attorney." This motion was supported by an affidavit to the effect that no sureties on the undertaking had justified as required by law. On May 16, 1903, the court sustained the motion to dismiss the appeal, its order being as follows: "This day, after argument by counsel, the motion to dismiss the appeal herein is by the court sustained."

On January 9, 1904, the appellant filed a motion to dismiss the case, for the reason that "plaintiff has for more than six

months neglected to demand or have a judgment entered in accordance with the rulings of this court sustaining said motion" to dismiss the appeal. This motion was denied. Afterward, on February 6, 1904, the court entered judgment of dismissal of the appeal, which, after the introductory part, is as follows: "Now, therefore, it is ordered, adjudged, and decreed that the said appeal be dismissed at defendant's cost, and that said cause be remanded to the court from which said appeal was taken." This appeal is from this judgment of dismissal, and was taken to this court on the 6th day of February, 1904.

1. It is contended that the appeal to this court should be dismissed, for the reason that the same was not taken within ninety days after the date of the order sustaining the motion to dismiss the appeal from the justice's court. This order, however, is not appealable. (Code of Civil Proc., sec. 1722, as amended by Session Laws 1899, p. 146; *Murphy v. King*, 6 Mont. 30, 9 Pac. 585; *Owen v. McCormick*, 5 Mont. 255, 5 Pac. 280; *Lisker v. O'Rourke*, 28 Mont. 129, 72 Pac. 416; *Butte & Boston C. M. Co. v. M. O. P. Co.*, 27 Mont. 152, 69 Pac. 714; *Territory v. Morehouse*, 8 Mont. 310, 21 Pac. 663; *Beattie v. Hoyt*, 3 Mont. 140.) The final judgment of dismissal was not entered until February 6, 1904, and no claim is made that the appeal was not taken within ninety days thereafter.

2. The errors assigned on this appeal are that the district court erred in dismissing the appeal from the justice's court, and, further, that the court erred in overruling defendant's motion to dismiss the case. Under the provisions of sections 170 *et seq.*, Code of Civil Procedure, the district court had jurisdiction of this case, and, if the court erred in making the intermediate order denying appellant's motion to dismiss the case, the judgment dismissing the appeal must also be error. Subdivision 6 of section 1004, Code of Civil Procedure, relating to the dismissal of actions, provides that an action may be dismissed "by the court, when after verdict or final submission,

the party entitled to judgment neglects to demand and have the same entered for more than six months." In this case more than six months intervened between the order sustaining the motion to dismiss the appeal and the time when the appellant moved to dismiss the case, yet the court denied this latter motion, and afterward made and caused to be entered the judgment dismissing the appeal. The court erred in denying appellant's motion to dismiss the case, and consequently erred in rendering the judgment of dismissal.

We think this judgment should be reversed, and the cause remanded with direction to the district court to sustain appellant's motion to dismiss the case.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded with direction to the district court to sustain appellant's motion to dismiss the case.

Reversed and remanded.

**McINTOSH HARDWARE COMPANY, APPELLANT, v.
FLATHEAD COUNTY, RESPONDENT.**

(No. 2,088.)

(Submitted March 22, 1905. Decided March 25, 1905.)

Appeal—Briefs—Dismissal—Action Against County—Attorney General—Attorney of Record.

Appeal—Briefs—Points Relied upon—Failure to State—Affirmance.

1. Where the brief of the appellant fails to show on what he relies for a reversal of the judgment, and the applicability of the propositions discussed in the brief cannot be determined without an independent investigation by the supreme court, the case stands as if no brief had been filed, and the judgment will be affirmed.

Attorney General—Attorney of Record—Transcript—Briefs—Service.

2. The attorney general is by law (Political Code, section 460) the attorney of record in all causes pending in the supreme court to which a county may be a party, and as such he is entitled to be served with a copy of the transcript and brief.

Actions Against Counties—Attorney General—Transcript—Briefs—Service—Dismissal.

3. An appeal by plaintiff in an action against a county may be dismissed for failure to serve the attorney general with a copy of the transcript and appellant's brief, and such dismissal, unless done without prejudice, will be in effect an affirmance of the judgment. (Code of Civil Proc., sec. 1741.)

Appeal from District Court, Flathead County; D. F. Smith, Judge.

CLAIM by the McIntosh Hardware Company against Flathead county. From a judgment of the district court affirming a disallowance of the claim by the board of county commissioners, plaintiff appeals. Affirmed.

Messrs. Gray & Long, for Appellant.

Mr. A. J. Galen, Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Upon presentation to, and disallowance of its claim by, the board of county commissioners, plaintiff appealed to the district court. Upon a trial defendant had judgment. Thereupon plaintiff appealed to this court. On the day set for the hearing, the attorneys for plaintiff not appearing, the cause was submitted on their brief. At the same time the attorney general submitted a motion to dismiss the appeal on the ground that he, the attorney of record for defendant, had not been served with a copy of the transcript or appellant's brief, and had no notice of the pendency of the appeal until the time for hearing had arrived. It is impossible to ascertain from the brief submitted by appellant upon what it relies for a reversal of the judgment—whether upon errors of law committed during the trial, the insufficiency of the evidence to support the findings and decision, or the insufficiency of the findings to support the judgment. No error is pointed out. But counsel have devoted several pages to the discussion of legal propositions, the applicability of which to the facts in the record this

court cannot determine without an independent investigation. This the court cannot undertake to do. The case stands as if no brief had been filed. For this reason the judgment must be affirmed. (*Elliott et al. v. Martin et al.*, 27 Mont. 519, 71 Pac. 756; *Casey v. Thieviege et al.*, 27 Mont. 516, 71 Pac. 755.)

This disposition of the case renders it unnecessary to consider the motion submitted by the attorney general, though the same result would be reached on a disposition of it. The attorney general is by law the attorney of record for the defendant county (Political Code, sec. 460), and as such was entitled to be served with a copy of the transcript and brief. Following the rule heretofore adopted by this court (*Murray v. Livingston*, 29 Mont. 567, 78 Pac. 1116), the appeal might be dismissed. This, unless it were done without prejudice, would be an affirmance of the judgment. (Code of Civil Proc., sec. 1741.)

The judgment is affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

32	256
33	141
33	142

32	256
36	281

STATE EX REL. NISSLER ET AL., RELATORS, v. DONLAN,
JUDGE, ET AL., RESPONDENTS.

(No. 2,176.)

(Submitted March 11, 1905. Decided March 31, 1905.)

Prohibition—District Courts—Departments—Rules for Distribution of Business—Effect—Prejudice of Judge—Change of Venue—Application—Time—Probate Proceedings—Statutes.

District Courts—Departments—Rules—Jurisdiction.

1. The several departments of a district court, presided over by different judges, constitute but one court, and the assignment of any portion of the business, by virtue of its rules, to any department,

still leaves it pending in the district court, and jurisdiction is not lost by the fact that it may theretofore have been pending in another department or before another judge.

District Courts—Rules—Force and Effect.

2. After the district court has adopted rules, under the limitations prescribed by Code of Civil Procedure, section 111, they have the force of statutes, and become binding upon it and litigants.

District Courts—Rules—To be Enforced—When.

3. Rules of district courts should be enforced, except when the court, for good cause shown, relaxes them in order that justice may be done.

District Courts—Departments—Distribution of Business—Order Binding.

4. After a district court, consisting of two or more departments, has distributed its business among the several departments by an order, concurred in by all the judges, such order should be held binding, even in the absence of rules, until revoked or modified by the authority that made it.

Statutes—Fair Trial—Bias and Prejudice—Judges—Disqualification—Probate Proceedings.

5. The provisions of section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws 1903, Second Extra. Session, p. 9); declaring that no judge shall continue to preside in any action or proceeding after an affidavit of bias or prejudice on his part has been filed, are applicable to probate proceedings.

What Constitutes a "Hearing."

6. A "hearing" includes the trial of the case, a hearing on a motion, or a hearing in a proceeding of any character.

Action—Proceeding—What is Included in Terms.

7. The words "action" and "proceeding" include all intermediate steps to be taken in an action or proceeding.

Motion—Step in Case.

8. A "motion" is but a step or proceeding in a case.

Statutes—Fair Trial—Judges—Disqualification—Affidavit—When to be Filed.

9. Under Code of Civil Procedure, section 180, as amended by Laws of 1903 (Second Extra. Session, page 9), providing that no judge shall act in any civil action or proceeding in which an affidavit of disqualification has been filed at any time before the day fixed for the trial or hearing, such affidavit is not effective to interrupt a hearing after the day fixed for it, no matter whether it be a final hearing or trial, or merely a step taken in the case involving a decision of some controverted matter.

Statutes Open to Abuse—How to be Construed.

10. Where a statute is open to much abuse, it will be strictly construed according to its express terms, and its provisions will not be broadened by implication so as to include conditions not clearly within them.

District Courts—Referees—Findings and Recommendations—Setting Aside.

11. *Quære* May a trial court disregard the findings and recommendations of a referee, under an order of reference contemplating the report of a final decree settling an account in accordance with the findings of fact and conclusions of law of the referee?

Prohibition—Judges—Disqualification—Fair Trial.

12. Prohibition does not lie to stay a district judge from proceeding, further in the hearing of a motion made in a probate proceeding,

where an affidavit of disqualification was not filed before the day fixed for the hearing of such motion. (Laws of 1903, Second Extra Session, p. 9.)

ORIGINAL application by the state, on relation of Christine Nissler and others, for prohibition to restrain Michael Donlan, as judge of the district court of the second judicial district, for the county of Silver Bow, and to restrain such court, from proceeding to hear a motion to confirm the report of a referee on objections to the account of J. K. Heslet as executor of the last will and testament of Christian Nissler, deceased. Alternative writ vacated and proceedings dismissed.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE
OPINION.

Application for writ of prohibition. On May 1, 1904, J. K. Heslet, executor of the last will and testament of Christian Nissler, deceased, filed in department 3 of the district court of Silver Bow county, to which department probate proceedings had been assigned, an account of his administration of the estate, showing his receipts and disbursements up to that date. The relators, being beneficiaries under the will, on behalf of themselves, and also as guardians of other beneficiaries who were minors, filed objections questioning the correctness of the account in many particulars. John B. McClernan, the judge then presiding in that department, referred the issues thus presented to Lewis P. Forestell, a member of the bar, as referee, with power to hear and determine them, and to report his findings of fact and conclusions of law thereon. The referee filed his report on December 1, 1904. He disallowed many of the items charged in the account, amounting to several thousand dollars. Thereupon the relators, through their counsel, moved the court to "confirm" the report, and to tax the executor with the costs of the reference, presenting a memorandum of their costs and disbursements in connection with the hearing before the referee. Counter-motions were made by the executor, asking the court to reject the report of the

referee, to make other findings in his favor, and to tax costs. The executor also served his notice of intention to move for a new trial. These steps were all taken by the parties in interest during the early days of December, 1904.

On January 2, 1905, George M. Bourquin and Michael Donlan, having theretofore at the general election of 1904 been elected, respectively, to the office of judge in Silver Bow county, qualified and entered upon the discharge of their duties in the other two departments of the court, under the rules theretofore in force, John B. McClernan succeeding himself, and presiding in department 3. This condition of affairs continued until February 8th, when the three judges adopted new rules, distributing the business of the district court among the departments, and assigning the judges to different departments. Under these rules, all probate business was assigned to department 3, where it was then pending, together with all criminal cases and other cognate proceedings. The other business was divided between the other two departments. The judges were assigned: John B. McClernan, to department 1; George M. Bourquin, to department 2; and Michael Donlan, to department 3. In the meantime no disposition had been made of the report of the referee upon the account in the Nissler estate, and the motions pending with reference to it.

On February 17th, on motion of the executor, the hearing on the report of the referee was set down for the following day, Saturday being the day fixed, under the rules, for hearing probate matters. The relators appeared and moved the court to vacate the order setting the hearing on the ground that Judge Donlan had not jurisdiction to proceed with it, by reason of the fact that John B. McClernan, upon the distribution of the matters pending in court, had reserved for hearing and determination by himself all matters connected with the settlement of the executor's account. At this time no order had been made in any of the departments touching this alleged reservation by Judge McClernan. Judge Donlan overruled the motion and proceeded with the hearing. During the noon recess

Judge McClernan made and entered an order in department 1 reserving the hearing to that department, notwithstanding the rules assigned all probate business to department 3. This was done without consultation with either of the other judges. When the court reconvened, Judge Donlan declined to regard this order as binding. Further hearing on the matter of the account was then postponed to February 25th. When the time to proceed arrived, the hearing was again postponed to March 4th.

In the meantime the relators filed in department 3 an affidavit, under the provisions of section 180 of the Code of Civil Procedure, as amended by the Act of the Second Extraordinary Session of the Eighth Legislative Assembly (Laws 1903, 2d Ex. Sess., p. 9), alleging that Judge Donlan was disqualified to proceed with the hearing by reason of his bias and prejudice in the matter, and asking that he proceed no further with it, but transfer the administration to some other district judge. Judge Donlan declined to relinquish jurisdiction, and refused to make the order transferring the administration. He announced that he would proceed because he was of the opinion that the Act under which the affidavit of disqualification was filed had no application to probate proceedings. Thereupon application was made to this court for a writ to stay Judge Donlan from proceeding further.

Mr. Miles Cavanaugh and *Mr. Charles Mattison*, for Relator.

Mr. W. M. Bickford and *Mr. George F. Shelton*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Much was said during the argument in this court as to whether, under the rules adopted by the judges for the apportionment of business and the assignment of judges, Judge McClernan had authority to make the order reserving to his department the determination of the controversy over the execu-

tor's account. The contention was made by relators that since by virtue of the order of reference, the report of the referee was made to Judge McClernan, for this reason he, sitting in department 1, had jurisdiction of the matter, notwithstanding the rules. Counsel for respondents contend that, inasmuch as the administration proceedings were pending in department 3 at the time the rules were adopted and promulgated, under which such business was assigned to department 3, it properly belonged there, and that Judge Donlan was exercising proper jurisdiction in proceeding to hear and determine them.

There is nothing in the record to indicate that at the time the rules were promulgated, and the apportionment of business made, any exception or reservation was discussed with the other judges or made by Judge McClernan in any manner whatever. Apparently the rules were deemed final, for the time being, and to distribute all business then pending in the court. While the judges exercising their duties in their respective departments must, for some purposes, be regarded as presiding over different courts, yet the court is in fact one court, and has jurisdiction of all matters which may properly be brought before it. The assignment of this or that portion of the business to one department still leaves it pending in the district court, so that jurisdiction is not in any sense of the word, lost by the fact that it may have theretofore been pending in another department or before another judge. If a cause or proceeding pending in any department is in such condition that another judge than the one who regularly presides there may be called in to assume jurisdiction and dispose of it, then such business might likewise be transferred from that department to another, and the judge who presides in the latter would have the same power to proceed with it as would the judge in the department from which the particular matter was transferred.

Rules regulating the distribution of business under the conditions prevailing in that court are a necessity, and could hardly be dispensed with, for by no other means could un-

seemly conflicts of authority among the judges be avoided, and causes and proceedings before the court be conducted and disposed of in an orderly manner. When once adopted, under the limitations prescribed by law (section 111, Code of Civil Procedure), they become binding upon the court and litigants, for they have the force of statutes within the limitations of their application (18 Ency. of Pl. & Pr. 1262), and should be enforced, except when the court, for good cause shown, in a particular case, may relax them in order that justice may be done. (*State ex rel. King v. District Court*, 25 Mont. 202, 64 Pac. 352; *M. O. P. Co. v. B. & M. etc. Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Martin v. De Loge*, 15 Mont. 343, 39 Pac. 312.)

Ostensibly, the rules promulgated by the judges on February 8th were in full force, and no reason appears why they should have been disregarded. But even in the absence of rules, after the business has been distributed by an order of court concurred in by all the judges, such order should be held binding until revoked or modified by the same authority which made it. In this way only may an unseemly conflict of authority be avoided. But this is somewhat of a digression.

The particular ground of the present application is that Judge Donlan lost jurisdiction because of the filing of the affidavit imputing bias and prejudice by reason of which the relators could not have a fair trial of the issues presented by the motion or of any matter in the course of the administration.

Two questions, therefore, arise for decision: (1) Does section 180, as amended, apply to probate proceedings? And (2) Was the affidavit filed in time to disqualify Judge Donlan from proceeding to a conclusion of the particular matter under consideration?

The contention is made by respondents that the amended section has no application to probate proceedings. This view is based upon the fact that the Probate Practice Act contains a specific provision declaring the disqualifications of district judges in probate matters (section 2530, Title XII, Article IX, Chapter III, as amended by the Act of 1897, Laws 1897, p. 244),

which, it is said, is exclusive, since that same title also declares (section 2920) that, "except as otherwise provided in this Title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title." It is argued that these provisions, by mention of Part II, thereby exclude the notion that Part I has any application, and, of course, that since section 180, as amended by the Act of 1903, is found in Part I, it can have no application. This argument involves the assumption that the four Codes and their various Parts and Titles are separate and independent Acts, each dealing with a particular subject matter, and that the provisions of a particular Part or Title have nothing to do with any other Part or Title, unless it be so expressly declared in the one or the other. This view cannot be sustained. For the purpose of convenience, the enactments of the legislature were compiled by the commission in separate Codes, Parts, Titles, Articles and Chapters; but all were intended to be taken together as a whole, constituting a complete, consistent, and harmonious system.

The Code of Civil Procedure was intended to be a complete system of practice and procedure, and to apply to every character of action or proceeding which might be brought in any court, and, except where special provisions are made in the particular Part or Title, the general provisions of Part II relating to civil actions apply, in so far as they are suitable. Where they cannot apply, and specific provisions are not made, then the courts are to be governed by the practice and procedure at common law, for the common law is the rule of decision in this state, except in so far as it is repugnant to the Constitution of the United States and of this state, or of the provisions of these Codes. (Political Code, sec. 5162.)

Doubtless section 2920, *supra*, was enacted for the purpose of fixing definitely the practice and procedure in probate proceedings, so far as possible, to carry out this idea, and set at rest any doubt that might otherwise exist as to the rules of practice and procedure applicable. This view is sustained by

section 5161 of the Political Code, which declares that the provisions of the four Codes, except as provided in sections 5162 and 5163, are to be construed as if they had all been passed at the same moment, and were all parts of the same statute. These latter two sections lay down the rule of construction to be applied to conflicting provisions of the different Titles and Chapters, as do sections 5164 and 5165 with reference to similar conflicts in the provisions of the different Articles and sections.

Speaking, generally, Part I of the Code of Civil Procedure (sections 1-440) contains provisions necessary to constitute the courts, and defines the incidental powers of the courts and judges under the Constitution. It provides for terms of courts. It likewise defines the qualifications of jurors, and provides for the mode of selecting, drawing, and summoning them. It provides for the use of a seal by courts of record. It defines the qualifications necessary to enable one to be admitted to practice law in the courts of this state, lays down rules to regulate the conduct of attorneys and counselors, and provides for their removal from office when they have been adjudged guilty of conduct which renders them unworthy of confidence. This part of the Code therefore has to do with every phase of the administration of justice and the adjustment of the rights of parties, whether in actions *eo nomine* or in special proceedings, civil or criminal, as defined in Part V. To say that it does not apply to probate proceedings is to say that, without express provision of law, probate proceedings—one species of special proceedings—are to be put into a class by themselves, and that we must look exclusively to the Title containing provisions with reference to them for the instrumentalities by which the rights of those interested must be determined. If this were true, then there would be no provision for terms of court applicable; no mode for selecting, drawing, and impaneling jurors, nor means for the regulation of the conduct of attorneys, nor authority for the use of a seal. Indeed, since this Part has to do with the constitution of courts,

so far as they may be constituted by statutory authority, there would be no instrumentalities for conducting probate matters, for none are provided for in the Title of the Code making special provisions with reference to them.

Section 180, as amended, therefore, must apply to all proceedings provided for in the Code of Civil Procedure, unless a special provision is found in some part of it in conflict with that section, or the nature of the proceeding does not permit such application. Nor is section 2530, *supra*, either as first enacted or as amended (Session Laws 1897, p. 244), in conflict with any provision contained therein. Such additional disqualifications as are declared in the Act of 1897 are to be regarded as merely cumulative in character, and not exclusive.

It is true that this court has construed amended section 180 as not applicable to contempt proceedings, though they are provided for in the Code of Civil Procedure. (*State ex rel. B. & M. etc. Min. Co. v. Clancy*, 30 Mont. 193, 76 Pac. 10.) This construction was based upon the theory that contempt proceedings are criminal in character, that the original section did not apply to them, and that the amended section does not apply in the absence of an express declaration to that effect. There is nothing in that case in conflict with the views here expressed, for, although probate proceedings are special and statutory in their character, they must be classed among proceedings of a civil nature. The same reason for excepting them also from the application of the statute does not, therefore, exist. Besides, the Act itself, in terms, applies to all proceedings of a civil nature, as well as to actions in the stricter sense.

Was the affidavit filed in time to disqualify Judge Donlan from hearing the motion upon settling the account? It will be noticed that amended section 180 contemplates that once a judge has been found to be disqualified in an action or proceeding, he must not thereafter sit in it at any stage of it. Such is the effect, also, of section 2530, as amended by the Act of 1897 with reference to probate proceedings. The latter sec-

tion declares that the judge, *whenever* any of the grounds of disqualification are made to appear of record, shall thereafter call in another judge, who shall from time to time preside in the place of the disqualified judge. This implies that any of the disqualifications enumerated may be made to appear at any time. Section 180, however, declares that the particular disqualification of imputed bias and prejudice shall be made to appear by affidavit filed at any time before the day fixed for the trial or hearing. A hearing includes the trial—a hearing on a motion or in a proceeding of any other character. The words “action” and “proceeding,” of course, include all steps to be taken in an action or proceeding, for a motion is but a step in a case, or proceeding in a case; but, whether the use of the word “motion” broadens the application of the statute or not, the intention is clearly manifested that the affidavit is not to be regarded as effective to interrupt a hearing after the arrival of the day fixed for that purpose, no matter whether it be a final hearing or trial, or merely a step taken in the case, involving a decision of some controverted matter. The disqualification of imputed bias and prejudice provided for in subdivision 4 of the Act is purely statutory. It does not rest upon the ascertainment of any fact, but only upon an imputation. Such being the case, and the statute being open to so much abuse, we are inclined to construe it strictly according to its express terms, and not broaden it by implication to include conditions not clearly within them.

The uncontroverted fact is that the hearing of the motions filed with reference to the report of the referee was taken up on February 18th. How far it proceeded on that day does not appear. The hearing was then postponed, to be resumed at a later date. Under these conditions, we do not think that, for the purpose of the proceeding then and now before the district court, the affidavit was filed in time, or that Judge Donlan thereby lost jurisdiction to proceed. The statute does not admit of a construction that would permit a litigant to file an affidavit of disqualification after the day for hearing has arrived, and thus rob the court or judge of the power to proceed.

It is questionable, upon the facts appearing in the record before us, whether there was any controversy before the court for trial, except such as arose upon the motion to tax costs. The power of the referee under the order of court seems to have contemplated the report of a final decree settling the account in accordance with the findings of fact and conclusions of law made by the referee. If such was the case, then, under the provisions of the statute (section 1140, Code of Civil Procedure), nothing was left for the court to do but to dispose of the motion to tax costs and enter the decree in accordance with the findings of the referee. (*Murphy v. Patterson*, 24 Mont. 575, 63 Pac. 375.) This matter, however, is not now before this court, nor do we care to express an opinion with reference to it. These remarks we make merely to avoid an inference to the effect that a trial court may disregard the findings and recommendations of a referee under the power which seems to have been given to the referee in this case.

For the reasons stated, we are of the opinion that there is no merit in this application. The alternative writ heretofore issued herein is vacated and set aside, and the proceedings dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

LYNCH, RESPONDENT, v. HERRIG, APPELLANT.

(No. 2,065.)

(Submitted March 17, 1905. Decided March 31, 1905.)

Resulting Trusts—Fraud—Equity Jurisdiction—Statute—Construction—Appeal—Record—Statement on Motion for New Trial.

New Trial—Appeal—Statutes.

1. An appeal from an order denying a new trial will not be considered if not taken within the time allowed by statute.

New Trial—Statement—When Considered on Appeal from Judgment.

2. The statement on motion for a new trial, as settled and in the record, may be considered, on appeal from the judgment, as to all errors of law therein specified, though an appeal from the order denying the motion for a new trial was not taken in the time allowed.

Resulting Trusts—Arise by Operation of Law—Not Dependent upon Contracts.

3. The trust presumed to result, under Civil Code, section 1312, in favor of the person who pays the consideration for the purchase of property, title to which is taken in the name of another, does not arise from, or depend upon, a contract or agreement between the parties, but is independent thereof and arises by operation of law, though such agreements may be considered in establishing the ownership of the money and how it was invested.

Resulting Trusts—Consideration—When to be Made.

4. To raise a resulting trust in favor of one who pays the purchase price of property, title to which is taken in the name of another, the payment of the consideration must be made at the time when, or before, the legal title to the property passes to the party to be charged.

Resulting Trusts—What Part of Consideration to be Paid or Tendered.

5. To establish a resulting trust, where land sought to be charged therewith is purchased under an executory contract, the legal title only passing on payment of the price, it is sufficient if an aliquot part of the entire price is paid or tendered by the person claiming the existence of the trust, at any time before the legal title passes.

Resulting Trusts—Statute of Frauds—Inapplicable.

6. The statute of frauds is inapplicable in the case of resulting trusts.

Resulting Trusts—In Land—When Declared.

7. A resulting trust in land can only be declared when the legal title has passed to the party against whom the trust is sought to be declared.

Resulting Trusts—Equitable Title—When Property.

8. An equitable title to land, which upon payment of a balance due on the purchase price will ripen into a legal title, is property, a resulting trust in which may be declared and enforced by a court of equity.

Equity—Jurisdiction—Prevention of Fraud.

9. Equity has jurisdiction to prevent the consummation of a fraud.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

SUIT by Charles A. Lynch against Fred Herrig and another. From a judgment for plaintiff, Herrig appeals. Affirmed.

Mr. Sidney M. Logan, for Appellant.

Before a trust can arise from the circumstance that the purchase price is paid by one person and the title taken in the

name of another, it must be shown that the plaintiff is without legal remedy; that a whole, not a part, of the purchase price was paid by the plaintiff; that such purchase price must be paid by the person claiming the trust at the time of the conveyance, or that the plaintiff assumed an absolute obligation to pay such purchase price. (Tiedeman on Real Property, sec. 500; 2 Pomeroy's Equity Jurisprudence, 1037; 1 Perry on Trusts, 5th ed., secs. 133, 134, 135; *Cases v. Cudding*, 38 Cal. 193.) A payment of part of the purchase price will not raise the trust *pro tanto* unless such payment be for a distinct and ascertainable part of the land, and a mere general contribution to the fund will not suffice. (*Guthrie v. Tullock*, 5 Wash. 283, 31 Pac. 871; *Barger v. Barger*, 30 Or. 268, 47 Pac. 702; 1 Perry on Trusts, 132.) Specific performance would seem to be the most logical remedy in this case, since all the rights claimed by plaintiff seem to be based upon an express agreement, or rather two express agreements, and a trust can never be created by an agreement unless such agreement be in writing. A resulting trust arises purely by operation of law and whenever it is sought to base such a trust on an agreement the rules applicable to express trusts intervene, and unless such agreement be in writing there is no trust.

But the agreements mentioned in the complaint and the testimony of the plaintiff lack all the elements necessary to entitle the respondent to the remedy of specific performance. There is a lack of consideration. (*Bear Track M. Co. v. Clark*, 6 Idaho, 196, 54 Pac. 1008.) The contract is uncertain and incomplete. (*Worthington v. Worthington*, 32 Neb. 334, 49 N. W. 354; Tiedeman on Real Property, 500; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333. See, also, Civil Code, sec. 4416, subd. 6.) It lacks mutuality. (*Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414; Pomeroy on Contracts, sec. 163; *Ryan v. Dunphy*, 4 Mont. 356; 47 Am. Rep. 355, 5 Pac. 324; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Electric L. Co. v. Mobile Ry. Co.*, 109 Ala. 190, 55 Am. St. Rep. 928, 19 South. 721.)

Messrs. Noffsinger & Folsom, for Respondent.

The facts in this case constitute both a resulting trust and a constructive trust. (As to resulting trusts, see 10 Am. & Eng. Ency. of Law, 1st ed., pp. 5, 8, and cases cited; *Muller v. Buyck*, 12 Mont. 354, 30 Pac. 386; *Walton v. Karnes*, 67 Cal. 255, 7 Pac. 676; *Somers v. Overhulser*, 67 Cal. 237, 7 Pac. 645; *Case v. Coddington*, 38 Cal. 193.)

"Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud or where, though originally acquired without fraud, it is against equity that it should be retained by him who holds the legal title." (Washburn on Real Property, vol. 2, p. 520; *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765.) Owning an interest in the contract, plaintiff is entitled to all its benefits. (*Anthe v. Heide*, 85 Ala. 236, 4 South. 380; *Hidden v. Jordan*, 21 Cal. 94; *Moore v. Moore*, 74 Miss. 59, 19 South. 953; *Thomas v. Jameson*, 77 Cal. 91, 19 Pac. 177; *Hellman v. Messmer*, 75 Cal. 166, 16 Pac. 766; 10 Am. & Eng. Ency. of Law, 1st ed., 14, 15.)

A trust relation applies equally to real and personal property. (10 Am. & Eng. Ency. of Law, 1st ed., p. 14, sec. 6.) Bispham in his Principles of Equity, says: "It applies to both realty and personalty, and trusts of this nature are expressly excepted out of the statute of frauds." (*Grant v. Heverin*, 77 Cal. 263, 19 Pac. 493; *Ellsworth v. Ames Co.*, 125 Ill. 223, 17 N. E. 467; *Union Bank v. Barker*, 8 Humph. (Tenn.) 447; *Creed v. Lancaster Bank*, 1 Ohio St. 1.) The following cases are upon contracts relating to land or contracts for acquiring title thereto: *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, and note, 18 N. E. 334; *Bear v. Koinigstein*, 16 Neb. 65, 20 N. W. 104; *Lambert v. Stees*, 47 Minn. 141, 49 N. W. 662; *Brotherton v. Weaterby*, 73 Tex. 471, 11 S. W. 505; *Bell v. Warden*, 39 Tex. 108; *Doss v. Slaughter*, 53 Tex. 237; *Rose v. Treadway*, 4 Nev. 455, 97 Am. Dec. 546; *Treadway v. Wilder*, 8 Nev. 91.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal by defendant from a final judgment, and from an order overruling a motion for a new trial.

The material allegations of the complaint are as follows: That on or about the 29th day of December, 1899, the defendant, for and in behalf of himself and plaintiff, entered into a contract with the Northern Pacific Railway Company for the purchase of the south half of section 19, township 28 north, of range 25 west, for the sum of \$640, payable in annual installments of \$106.60; that the first payment was made on or about the 29th day of December, 1899, one being due on the 29th day of December of each year thereafter until the full amount, together with interest, had been fully paid; that the railway company at the time the contract was entered into was, and ever since has been, except as herein stated, the owner of said land; that the said purchase by defendant was made and entered into in his own name, but in trust and on behalf of plaintiff for one-half of said land, to wit, the southeast quarter of said section; that, in consideration of said contract, but prior to entering into the same, the plaintiff paid and gave to defendant his one-half of the amount necessary to make the first payment thereon, which the said defendant paid over to the railway company, and the contract of purchase was forwarded to defendant, and that upon receipt of the same he was to transfer the interest of plaintiff therein to him, but that upon an examination of the provisions of said contract it was found that it contained a provision preventing any assignment or transfer of a portion of said tract of land therein mentioned, less than the whole thereof, and that said defendant thereupon agreed that, at the time he and the plaintiff were at some place where the agreement could be drawn, he would give plaintiff a written agreement showing his interest in said contract and said lands, and that when the contract was fully paid, and title obtained thereto from the railway company, he would at once convey to plaintiff the portion of said lands purchased for him as aforesaid; that thereafter plaintiff paid to defendant his one-half of the payment due on December 29, 1900, with

interest thereon, and also one-half of all taxes upon the entire land for the year 1900, which was accepted by said defendant in full payment thereof, and was duly paid to the railway company; that, prior to the time the payment for the year 1901 was due, plaintiff offered to pay defendant his share of said payment and interest, then or at any time the said defendant wanted it; that said defendant told him that he would call upon him for the money when he was ready to remit to the railway company, but that he has failed and neglected to call for it, and that the plaintiff has at all times been, and is now, ready to pay the same, and tenders into court for him the sum of \$75, which is in excess of said annual payment and taxes for the year 1901; that since the time of said annual payment has passed the said defendant has refused to accept the money or any money from plaintiff in payment thereof, and that said plaintiff offered to pay him any sum that was due under said contract of purchase and the agreement with plaintiff, and also for all taxes and charges thereon, but the said defendant has refused to accept the same or any portion thereof, and has said that all of the land embraced in the contract is his, and that he did not propose to accept any money from plaintiff, or allow him to have anything to do with said land, and that he would sell or dispose of the same as his own in every way, and that plaintiff had no interest therein. Then follow allegations that defendant is about to sell or dispose of the contract, where the land is situated, the occupation of defendant, and want of ability to see him, etc., and allegations of the insolvency of the defendant. The complaint further alleges "that the plaintiff has complied with all the conditions on his part to be performed as far as possible, and is ready to comply with all the conditions thereof." To this complaint a demurrer was interposed, which was overruled, and defendant answered, denying "each and every allegation of said complaint."

The Northern Pacific Railway Company also filed an answer, which is immaterial for consideration upon this appeal, to which plaintiff replied. The case went to trial before a

jury, which rendered special findings in plaintiff's favor, whereupon a final decree was entered declaring that the plaintiff "is the owner of the southeast quarter of section 19, township 28 north, of range 25 west, subject to the interest of the defendant the Northern Pacific Railway therein, and is entitled to the possession thereof." This decree is based upon the conclusion of the court that the defendant holds the interest he now has in said quarter section of land in trust for the plaintiff. The decree then enjoins the defendant from "in any manner interfering with or molesting the plaintiff in the possession of said lands or any portion thereof," and "from in any manner transferring, assigning, or conveying said lands, or a portion thereof, or the said contract with the Northern Pacific Railway Company." The decree further provides that, "if he shall acquire title to said lands under said contract, to convey the southeast quarter of said section 19 to the plaintiff, Charles A. Lynch, provided that said plaintiff shall have paid into court, or tendered or paid to the defendant, the sums required to be paid under said contract in the manner provided therein." The decree then enjoins the railway company from conveying the lands to anybody except the defendant or plaintiff, provided "that said parties shall have complied with said contract hereinbefore referred to, with the said Northern Pacific Railway Company." The decree further provides that it does not intend to in any way interfere with the rights of the railway company under said contract, but only to adjudicate the interests between plaintiff and defendant thereunder. The defendant railway company seems to have been satisfied with the decree entered, not having appealed therefrom.

It may be somewhat difficult to conclude from the complaint alone what particular theory of recovery plaintiff's attorney had in mind, but, after a consideration of the complaint and the testimony given at the trial, all of which is contained in the transcript on appeal, we have concluded that the purpose of the suit is to have a resulting trust declared in favor of plaintiff to an

interest in the contract entered into between defendant and the railway company. We shall consider the appeal upon this theory.

An examination of the record discloses that the appeal by defendant from the order denying his motion for a new trial was not taken within the time allowed by the statutes. Therefore such appeal will not be considered by this court. However, the statement on motion for a new trial, as settled and in the record, may be considered, on the appeal from the judgment as to all errors of law therein specified. (*Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 521.)

1. As to the jurisdiction of a court of equity in reference to resulting trusts in land generally: The Civil Code of Montana provides that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." (Civil Code, sec. 1312.) This statute is but declaratory of the common law, and it has been held by courts of equity, since the earliest days, that if one person pays the consideration for the purchase of property, and the title is taken in the name of another, such other holds the property in trust for the person who pays the consideration. This resulting trust does not arise from, or depend on, a contract or agreement between the parties. It is independent of any contract, and arises by operation of law from the fact that the consideration for the purchase of the property was paid by one person, and the title to the property purchased taken in the name of another. While the agreements or contracts between parties do not of themselves form the basis of any relief as to the trust, they may be important for consideration in assisting to establish the fact of the ownership of the money, and how it was invested. (*Bruce v. Roney*, 18 Ill. 67; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383.)

It is well established that, in order to raise a resulting trust, the payment of the money as the consideration for the purchase of the property must be made at the time or before the legal title to the property passes to the party to be charged in the trust capacity, and that any moneys paid or contracts or agreements made thereafter are not sufficient to raise a resulting trust. Here the legal title to the land still rests in the vendor; the railway company only having given an executory contract of purchase and sale to the defendant herein, which provides that the conveyance of the property shall only be made after full payment of the purchase price. The first payment by respondent was made prior to the making of this executory contract with the railway company, the second payment was made at the time specified in such contract, and the third payment was tendered in time to meet the third payment under said executory contract. The subsequent payments are not yet due. The plaintiff offers in his complaint to comply with the conditions of the contract.

To establish the existence of a resulting trust, where the land sought to be charged therewith is purchased under an executory contract, the legal title only passing upon full payment of the purchase price, it is sufficient if the money is paid by the person claiming the existence of the trust at any time before such legal title passes. (*Gilchrist v. Brown*, 165 Pa. St. 275, 30 Atl. 839; *Moore v. Moore*, 74 Miss. 59, 19 South. 953; *Murry v. Sell*, 23 W. Va. 475; *Milner v. Freeman*, 40 Ark. 62.) It is another well-recognized principle that the money paid must be an aliquot part of the entire purchase price. Therefore, unless plaintiff pays or tenders such aliquot part no trust will arise because of indefiniteness.

The statute of frauds has nothing to do with the case, because specific performance of the contract or agreement between the parties is not necessary or sought, and the trust does not arise upon the contract, but upon the payment of the purchase money. (*Bates v. Kelly*, 80 Ala. 142; *Millard v. Hath-*

away, 27 Cal. 119; *Walton v. Karnes*, 67 Cal. 255, 7 Pac. 676.)

It seems clear, therefore, that this action could not be maintained at the time of the commencement of the suit for the purpose of establishing a resulting trust in the land, because the legal title thereto did not rest in the party sought to be charged therewith. A resulting trust in land can only be declared when the legal title has passed to the party against whom the trust is sought to be declared. Here only a contract has been entered into for the purchase of land between the defendant and the Northern Pacific Railway Company. Respondent paid his half of the money necessary to procure the contract, and this payment was made prior to its procurement. This gave plaintiff an equitable interest in the contract. In other words, the appellant held the legal title to the contract in his own right, and in trust for respondent. The land is only affected incidentally, as the trust cannot attach to it until the contract has been performed, and the title passed from the railroad company to appellant.

2. As to the jurisdiction of a court of equity in reference to declaring a resulting trust in an executory contract of purchase: Can a resulting trust be established in Lynch's favor, as against Herrig, under the circumstances disclosed by the record?

As before stated, Herrig holds a contract for the purchase of certain lands from a railroad company, upon which a portion of the payments were not due at the time of the institution of this suit. Under this contract, Herrig does not become entitled to a conveyance of the legal title until the full purchase price is paid. No resulting trust can, therefore, be declared in the land, because Herrig does not hold the legal title thereof. He, however, has an equitable title to the lands, and a contract which will ripen into a right to demand the legal title upon the payment of the balance of the purchase price. This right is property, and is recognized as such by all the authorities. He may sell and dispose of it, and a conveyance of

the land by him would transfer this right under the contract to the grantee. Upon his death it would descend to his heirs. Being property of this character, recognized in both law and equity, a resulting trust in such property may be declared and enforced against defendant.

As well said by the supreme court of West Virginia in the case of *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329: "That equitable title is a sufficient title, in the eyes of a court of equity, to be the subject of a trust, sufficient to enable a court of equity to declare the right as to it, for there can be a trust under a legal or an equitable estate in anything which a court of equity recognizes as a subject of property. (27 Am. & Eng. Ency. of Law, 24; Underhill on Trustees, 9, note; 1 Perry on Trusts, secs. 67, 96.) If A buy an executory title with B's money, cannot B sue A and the vendor, before deed made, to declare the trust, and have the title made to him?" In that case A's land was sold under an order of court. B became the purchaser at the sale, and subsequently orally agreed with A that, upon payment of the amount of his bid to him, he would convey the land to A. The bid not having been paid, the property was resold, and B again became the purchaser. Afterward, and before B procured the deed upon the sale, he sold the land to C. A in the meantime had paid B certain sums on the agreement, and brought suit against B and C, asking that a trust against B be declared, and that C's purchase be canceled. In the opinion of Judge Brannon, he first bases the relief granted on the existence of an express trust, holding that the parol agreement between A and B was sufficient for that purpose (the statute of frauds of that state not prohibiting), and then states that, even if there was no express trust, a resulting one arose. Judge Dent, concurring specially, bases the relief on the ground that equity has jurisdiction to prevent the consummation of a fraud, and seems inclined to hold that a constructive trust arose.

Of course, in this state, no express trust can be based upon the oral agreement between plaintiff and defendant. (Civil

Code, sec. 1311.) But the agreement alleged and the facts found are sufficient to raise a resulting trust in the contract in plaintiff's favor. If plaintiff pays his share of the purchase money, as specified in the contract, a trust will result to him in the southeast quarter of said section.

3. As to the jurisdiction of a court of equity in reference to preventing the consummation of a fraud: But again, it is well established that equity will always interpose its jurisdiction to prevent the consummation of a fraud, and this jurisdiction can be called on at any time to make it effective. Defendant Herrig agreed with plaintiff, Lynch, that he would make a contract with the Northern Pacific Railway Company for the south half of section 19, and that, if Lynch should pay one-half the purchase price thereof, he would see that there should be conveyed to him the southeast quarter of the section. There was no writing between the parties. Lynch, relying upon this agreement, made two payments on the contract, and tendered a third, and also paid one-half of all the taxes on the land for the two years. If Herrig should be allowed to obtain a deed from the Northern Pacific Railway Company for the entire south half of the section, and he should then sell the land to an innocent purchaser without recognizing Lynch's right, or if he should sell or assign the contract of purchase to a third person, a *bona fide* holder, without recognition of such rights, Lynch would be defrauded. A court of equity has ample jurisdiction to interfere and prevent the consummation of such a fraud. So that, whether a trust arises from the dealings and transactions of the parties, or whether it is the purpose to prevent the consummation of fraud, equity has full and complete jurisdiction, and will grant the relief asked.

The decree appealed from may be a little too broad in some of its terms, but can work no injury to any of appellant's rights, and clearly does equity between the parties. We therefore advise that it be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

Affirmed.

Rehearing denied, June 3, 1905.

CITY OF HELENA, RESPONDENT, v. KENT, APPELLANT.

(No. 2,070.)

(Submitted March 18, 1905. Decided March 31, 1905.)

Municipal Corporations—Ordinances—Police Powers—Cleaning Sidewalks—Occupant of Premises—Validity of Ordinance—Prosecution—Process.

Municipal Corporations—Powers.

1. A city has no powers except such as are conferred upon it by legislative grant, either directly or by necessary implication.

Municipal Corporations—Ordinances—Police Powers—Sidewalks.

2. An ordinance making it the duty of the "occupant" of premises to keep the sidewalk in front of and adjoining them free from snow, ice, slush and other impediments to safe and convenient travel, and imposing a penalty for failure to comply with its provisions, is a reasonable and proper exercise of the police powers incident to municipal corporations, and not repugnant to constitutional or statutory provisions.

Municipal Corporations—Ordinances—Sidewalks—Statutory Construction.

3. Political Code, section 4800, subdivision 7, as amended by Session Laws of 1897, page 203, provides that a city has power to require the owners of premises to keep the sidewalk in front of and adjoining them free from snow, ice, etc. An ordinance of the city of Helena makes it the duty of the occupants of such premises within the city limits to do so. *Held*, that the city can proceed against the occupant as well as the owner, and that the remedy against the former is merely cumulative and not inconsistent with the exercise of the power granted in subdivision 7 of section 4800.

Municipal Corporations—Police Regulations—Infractions not Crimes—Action in Name of City.

4. Infractions of local police regulations, such as noncompliance with an ordinance making it the duty of an occupant of premises within city limits to keep them free from snow, ice, etc., are not, in their essence, crimes or misdemeanors, and actions arising out of them are properly prosecuted in the name of the city.

Municipal Corporations—Police Power—Statutory Construction.

5. The police power granted to municipal corporations under the "general welfare clause," is necessary to the tranquility, safety and

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protection of every well-ordered community, and constitutions and statutes, in the absence of provisions to the contrary, are to be construed with reference to that fact.

*Appeal from District Court, Lewis and Clark County;
Henry C. Smith, Judge.*

S. O. KENT was convicted of violating an ordinance of the city of Helena, and he appeals from the judgment and from an order overruling a motion for a new trial. Affirmed, Mr. Justice Milburn, dissenting.

Mr. E. A. Carleton, for Appellant.

Municipal corporations derive their powers from legislative grant. (1 Dillon's Municipal Corporations, 4th ed., sec. 89; *Reis v. Graff*, 51 Cal. 86; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Bell v. Plattville*, 71 Wis. 139, 36 N. W. 831; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.) These powers are strictly construed (McQuillin's Municipal Corporations, 48; Horr & Bemis on Police Ordinances, 17; Cooley's Constitutional Limitations, 195), and doubt as to such power is resolved against it. (*Minturn v. Larne*, 23 How. 435; *Ottowa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.) And no by-law or ordinance can enlarge its powers. (*Thompson v. Carroll*, 22 How. 422; 1 Dillon's Municipal Corporations, 367-372; *Herzo v. San Francisco*, 33 Cal. 143.) Where the mode or manner of exercising the power is prescribed by the legislature, the municipality is restricted to such mode or manner, and it is exclusive of all other modes in exercising the delegated power. (*Farmers' Loan etc. Co. v. Caswell*, 51 Barb. 33.) The legislature having designated the particular persons who shall be responsible for cleaning the walk, it is not competent to declare, as the ordinance here does, that an *occupant* is guilty of committing a nuisance if he does not clean the walk. Police power cannot be exercised in a manner that conflicts with the Constitution or laws of the state.

This is a criminal action and must be prosecuted in the name of the state. If not a criminal action, pure and simple,

under our Constitution and statutes, at least, it is so far criminal as to entitle defendant to an instruction as to reasonable doubt. It is only upon the theory that it is a criminal action that effect can be given to numerous sections of our Penal Code. Within the Penal Code is comprehended and included all prosecutions of which police and justice courts have jurisdiction. (*Earl v. Board of Education*, 55 Cal. 489; *C. P. R. R. v. Shakelford*, 63 Cal. 261; *Santa Barbara v. Sherman*, 61 Cal. 57; *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *State v. Stearns*, 31 N. H. 106; *Jacqueth v. Royce*, 42 Iowa, 406; *In re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *People v. Van Houten*, 13 Misc. Rep. 603, 35 N. Y. Supp. 186; *Brownsville v. Cook*, 4 Neb. 101; *State v. Goulding*, 44 N. H. 284; *Ruth v. Abington*, 80 Ill. 418; *Glenwood v. Roberts*, 50 Mo. App. 167.) Because the ordinance in question is *ultra vires*, and the action is criminal, the demurrer to the complaint should have been sustained.

Mr. E. C. Day, and *Mr. Edward Horsky*, for Respondent.

Police powers are usually conferred upon cities in a general welfare clause, as it is termed. Such is the case in Montana. (Political Code, sec. 4800, subd. 1.) An ordinance requiring owners or *occupants* of property to clear away snow and ice from a sidewalk contiguous to their premises is a valid exercise of the police power. (Dillon's Municipal Corporations, vol. 1, sec. 394; *In re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178; *Union Ry. Co. v. Cambridge*, 11 Allen, 287; *Kirby v. Boylston Market Assn.*, 14 Gray, 252, 74 Am. Dec. 682; *Taylor v. Lake Shore etc. Ry. Co.*, 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; rule approved in Dillon's Municipal Corporations, sec. 394; *Bonsall v. Lebanon*, 19 Ohio, 418; *Paxton v. Sweet*, 13 N. J. L. 196; *Mayor etc. v. Mayberry*, 6 Humph. 368, 44 Am. Dec. 315; *Woodbridge v. Detroit*, 8 Mich. 274; *Flynn v. Canton*, 40 Md. 312, 17 Am. Rep. 603; McQuillin's Municipal Ordinances, secs. 298, 458, and cases cited.)

While it is true that by subdivision 7, section 4800, the power to require the *owner* to keep the sidewalk free from snow and the cost of removal is a lien against the abutting property in case of the owner's failure to do so, this in no way militates against the *police* powers of the city to require the *occupant* of the property to do so. The effect of said subdivision 7 is to simply grant an additional power to the city, that is, a power in addition to the police power conferred in subdivision 1, a power in addition to that contained in subdivision 8, and a power in addition to that contained in subdivision 33 of section 4800. Moreover, apart from the police powers conferred in subdivision 1, and the general power conferred in subdivision 8, the city or town council has the power "*to define and abate nuisances and to impose fines upon persons guilty of creating, continuing, or suffering nuisances to exist upon premises which they occupy or control.*" (Political Code, sec. 4800, subd. 33.) Under the terms of the ordinance in question every person failing to comply with the provisions of the ordinance shall be deemed guilty of committing a nuisance; and while a fine is imposed, no provision is made for imprisonment.

That this is a civil action and simply in the nature of a police regulation, merely defining what is a nuisance, and that the defendant is not therefore entitled to a trial by jury in the police court, has been decided by the United States supreme court. (*Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301; *McQuillin on Municipal Ordinances*, sec. 304, p. 476; *Horr & Bemis on Police Ordinances*, secs. 169, 181, 170, citing numerous authorities; 2 *Williams on Municipal Corporations*, 559, 554, 547; *McQuillin on Municipal Ordinances*, secs. 330-334, citing numerous authorities; *Dillon's Municipal Corporations*, vol. 1, p. 433.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

The defendant was accused in a police court of the city of Helena of violating an ordinance requiring him to keep the sidewalk in front of the premises occupied by him free from ice and snow. On the trial before a jury he was found guilty, and from the judgment entered appealed to the district court, where the case was again tried to a jury, resulting in a verdict of guilty, and judgment was entered against the defendant. Defendant then filed his motion for a new trial, which was overruled. This appeal is from the judgment and from the order overruling a motion for a new trial.

1. The appellant contends that the city had no authority to pass the ordinance in question requiring a mere tenant or occupant to keep the sidewalk in front of the premises occupied by him free from ice, snow, etc. Section 10 of the ordinance complained of (Article III, c. 17) is as follows: "It shall be the duty of the occupant of any premises within the city limits, or in case the same are unoccupied, then of the owner or his agent to keep the sidewalks in front of and adjoining his premises clean and safe for pedestrians, and to repair the same from time to time, and such occupant, owner or agent, shall, with all reasonable dispatch, remove snow, ice, slush, mud or other impediment to safe and convenient foot travel, and prevent the continuance and accumulation of the same. Every person failing to comply with the provisions of this section shall be deemed guilty of committing a nuisance, and upon conviction thereof shall be fined not less than one dollar nor more than fifty dollars, and a like sum for each day that such nuisance is continued."

There is no principle of law better established than that a city has no power, except such as is conferred upon it by legislative grant, either directly or by necessary implication. Section 4700 of the Political Code reads: "A city or town is a body politic and corporate, with the general powers of a cor-

poration, and the powers specified or necessarily implied in this title, or in special laws heretofore enacted." Section 4703 of the same Code provides that a city "has such other powers as are incident to municipal corporations not inconsistent with the laws of the United States or of the state." The Act of the legislative assembly of March 8, 1897 (Session Laws 1897, p. 203), amending section 4800 of the Political Code, provides that a city has power, among other things:

"(1) To make and pass all by-laws, ordinances, orders and resolutions not repugnant to the Constitution of the United States, or of the state of Montana, or of the provisions of this Title, necessary for the government or management of the affairs of a city or town, for the execution of the powers vested in the body corporate, and for carrying into effect the provisions of this Title."

"(7) To provide for lighting and cleaning the streets, alleys and avenues; to regulate the use of sidewalks, and to require the owners of premises adjoining to keep the same free from snow or other obstruction, to regulate the deposition and removal of ashes, garbage or other offensive matter, in any street, alley, or on public grounds or on any premises, and to provide for levying the cost of such removal as a special tax against the property from which such matter was deposited."

"(8) To provide for and regulate street crossings, curbs, and gutters; to regulate and prevent the use or obstruction of streets, sidewalks and public grounds, by signs, poles, wires, posting handbills or advertisements, or any obstruction."

"(33) To define and abate nuisances and to impose fines upon persons guilty of creating, continuing or suffering a nuisance to exist on the premises which they occupy or control."

If the city had power to pass this ordinance, such power must be within the authority conferred by the statutes above quoted, all of which are a part of the same Title. This court, in *Davenport v. Kleinschmidt*, 6 Mont. 502, on page 527, 13 Pac. 249, quotes with approval from Judge Dillon's work on

Municipal Corporations the following: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in or incident* to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the exercise of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its Organic Act."

Section 4700, taken in connection with section 4703 and subdivision 1, *supra*, constitute a general grant of power, as well as a limitation of power, for authority is given to the city to pass all ordinances necessary for its government and management, and such ordinances shall not contravene constitutional or statutory provisions. In effect, these provisions state what is usually termed the "general welfare clause," and under such a clause it is well established that, in the absence of statutory prohibition, the city, in the exercise of its police power, may "establish all suitable ordinances for administering the government of the city, the maintenance of peace and order, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations." (McQuillin on Municipal Ordinances, sec. 434; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686.)

This ordinance is essentially a police regulation, and its enforcement an exercise of police power. This power was well known to the common law, and was defined by Blackstone more than twenty years prior to the adoption of the Constitution of the United States. (4 Blackstone's Commentaries, 162.) Municipal corporations have exercised this power from the beginning of our government, and it is necessary to the tranquility, safety, and protection of every well-ordered community; and constitutions and statutes, in the absence of provisions to the

contrary, are to be construed with reference to that fact. (*Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178.) "That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. * * * Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other. (*In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.) All property is held under the general police power of the state to so regulate and control its use in a proper case as to secure the general safety and the public welfare." (*People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.) The exercise of this power must certainly have some relation to the public health, comfort and safety, for the rights of property cannot be invaded under the guise of a police regulation for the protection of health when it is manifest that such regulation would not have that effect.

In re Goddard, 16 Pick. 504, 28 Am. Dec. 259, involved the collection of a penalty imposed for the violation of an ordinance requiring the owners or occupants of houses bordering on streets to remove the snow from their respective sidewalks. The court, in considering the questions presented, said with reference to this ordinance: "But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it; and it is laid, not upon a few, but upon a numerous class—all those who are so situated—and equally upon all who are within the description composing the class. * * * Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of

the community. He has this interest and benefit, often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. * * * For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community. Besides, from their situation, they have the power and ability to perform this duty, with the promptness which the benefit of the community requires; and the duty is divided, distributed, and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon anyone." (See, also, *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.)

An ordinance such as the one in question was sustained in *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178. The statute of New York authorized the enactment of ordinances for various purposes; among others, to prevent encumbering of sidewalks with any substance or material whatever, to provide for keeping them clear from snow, ice, dirt and other obstructions, to direct the sweeping and cleaning of streets by the persons owning or occupying the premises fronting thereon, and generally the trustees were empowered to pass such ordinances "not inconsistent with the laws of the United States and of this state as may be necessary and proper for carrying into effect the purpose of said corporation and the powers and privileges granted," etc. The ordinance was sustained under the general police power of the city. For general discussion, see McQuillin on Municipal Ordinances, sections 429, 458, *et seq.*

The ordinance in question provides that persons failing to comply with its provisions shall be deemed guilty of committing a nuisance. The act complained of is not a nuisance under any state law, and it has been held that under a power conferred upon a city to abate nuisances, the city is not au-

thorized to declare anything a nuisance which is not so in fact under the state law. (*Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Hennessey v. City of St. Paul* (C. C.), 37 Fed. 565.) But the statute here has conferred express authority upon the city to "*define* and abate nuisances," and to prevent the obstruction of streets. It is true that the cities are given the authority to remove the obstruction, and to tax the cost thereof against the property; but this provision is not exclusive, nor does it prevent the city from exercising its general police power in requiring the occupant of property to keep the same free from obstruction. The tenant of a town lot could not be permitted to encumber his property or the sidewalks or streets with offensive matter and escape liability by establishing the fact that he was only an occupant, and not the owner.

The proper exercise of police powers is incident to municipal corporations, and neither the statute nor the Constitution has prohibited the use of these powers; nor is the ordinance in question repugnant to constitutional or statutory provisions. The ordinance is fair, impartial and general, is consistent with the general legislation of the state in so far as it requires the removal of ice and snow, and is a reasonable exercise of the powers conferred by the legislature.

It is contended by appellant that under subdivision 7, section 4800, above, as amended, the city can only proceed against the owner of the property; but with this we do not agree. The remedy against the occupant is merely cumulative, and its assertion is not inconsistent with the exercise of the power granted in subdivision 7, above.

2. It is further contended that this is a criminal action, and should be prosecuted in the name of the state. The statute provides that all proceedings for the violation of any ordinance of a city must be prosecuted in the name of the city. (Political Code, sec. 4912.) The Constitution provides: "The style of all process shall be 'The State of Montana,' and all prosecutions shall be conducted in the name and by the authority of

the same." (Section 27, Article VIII.) The Article of the Constitution in which the above section is found vests and defines the judicial power of the state, creates a court of impeachment, a supreme court, district courts, and justices' courts. No other court is created by the Constitution, although power is vested in the legislature by the Constitution to create "other inferior courts * * * in any incorporated city or town." The justices' courts and the district courts as trial courts, and the supreme court as appellate court, are by the Constitution vested with full authority to hear and finally determine all criminal actions. Police and municipal courts are not created by the Constitution. Power is conferred by it upon the legislative assembly to provide for creating such courts, which "shall have jurisdiction in all cases arising under the ordinances of such cities," and "may also be constituted *ex-officio* justices of the peace," etc. The Constitution itself thus creates by name and vests with authority all courts necessary to enforce obedience of all laws of the state.

The offense here complained of is neither a felony nor a misdemeanor under the laws of the state, nor is it so denominated under the ordinance. It is not a violation of any state law. The action is one to recover a penalty for the violation of a municipal ordinance relative to the maintenance of a nuisance. From all this it seems manifest that the constitutional requirement, "all prosecutions shall be conducted in the name and by the authority of 'the State of Montana,'" contemplates such criminal actions as shall be instituted and prosecuted before the tribunals provided for in that Article of the Constitution for violations of the statutes of the state, and, as stated in *Davenport v. Bird*, 34 Iowa, 524: "It is fitting and appropriate that prosecutions for violations of the criminal laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation." Such a construction of this Article of the Constitution would be unwarranted, as not intended

by its framers. It was held by the supreme court of Pennsylvania under a Constitution which provides that the style of all process shall be "The Commonwealth of Pennsylvania," that this provision refers to such writs only as should become necessary to be issued in the course of the exercise of that judicial power which is established and provided for in the Article of the Constitution, and remains exclusively the subject matter of it. (*Commonwealth v. Ruff*, 3 Rawle (Pa.), 99. See *Barter v. Commonwealth* (Pa.), 3 Penr. & W. 253.)

Infractions of local police regulations, such as here presented, are not, in their essence, "crimes" or "misdemeanors," as those terms are employed in our criminal jurisprudence, and are therefore not criminal prosecutions. (McQuillin on Municipal Ordinances, secs. 309, 326 *et seq.*; 1 Dillon's Municipal Corporations, sec. 429 *et seq.*; *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178; *Williamson v. Commonwealth* (Ky.), 4 B. Mon. 146; *Mayor v. Mayberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315; *In re Goddard*, 16 Pick. 504; *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288.) Such actions need not be prosecuted in the name of the state, but should be prosecuted in the name of the city.

We advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN: I dissent. The general welfare clause in section 4800 of the Political Code declares, as stated in the opinion, that the city may make all laws not inconsistent with the federal or state Constitutions or the provisions of the Title in which the said section appears, which may be necessary for the government or management of the affairs of the city for the execution of the powers vested in the body corporate and for carrying into effect the provisions of the Title. Sub-

section 7 of section 4800 declares that the city has power to regulate the use of sidewalks, and to require the *owners* of the premises adjoining to keep the same free from snow or other obstruction. In my opinion, the maxim, "*Expressio unius est exclusio alterius*," applies here, and I believe that when the legislature said "owners" it meant owners, and nobody else; and that the ordinance complained of by the appellant in this case, authorizing the punishment to be put upon the *occupant* of the premises in front of which the sidewalk was, is inconsistent with the provision contained in subsection 7 of section 4800, and therefore is invalid. In other parts of said section 4800, in referring to lots and premises, the legislature uses both the words "occupants" and "owners," evidently having in mind the distinction between the two words, and not intending that the word "occupant" should be understood as meaning "owner" in any sense whatever.

FIRST NATIONAL BANK OF BUTTE, APPELLANT, v.
BELEY, SHERIFF, ET AL., RESPONDENTS.

(No. 2,071.)

(Submitted March 20, 1905. Decided March 31, 1905.)

Chattel Mortgages—Requisites—Affidavit of Good Faith—Renewal—Effect of Affidavit.

Chattel Mortgages—Statutory Requirements to be Strictly Followed.

1. The statutory requirements intended to protect the lien of the mortgagee on the mortgaged property against attaching creditors must be strictly followed.

Chattel Mortgages—Affidavit of Good Faith.

2. A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors, where it is not accompanied by the affidavit of the mortgagee, required by Civil Code, section 3861, that the same is made in good faith and without design to hinder, delay or defraud creditors.

Chattel Mortgages—Proper Affidavit of Renewal will not Validate Void Mortgage.

3. An affidavit of renewal of a chattel mortgage, filed under Civil Code, section 3866, stating the necessary facts, does not validate a mortgage which was originally void as to attaching creditors because of the absence of the affidavit of good faith required by section 3861 of the same Code, although such mortgage is good and valid between the parties to it.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by the First National Bank of Butte against Frank Beley, sheriff of Park county, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Kirk & Clinton, for Appellant.

Mr. A. P. Stark, and Mr. H. J. Miller, for Respondents.

MR. COMMISSIONER BLAKE prepared the opinion for the court.

This action was brought by plaintiff (appellant) against defendant (respondent), as sheriff of Park county, and his bondsmen, to recover the value of personal property levied on under a writ of attachment. The findings of the court are not attacked, and it appears therefrom that John Jervis and his wife executed and delivered to the plaintiff a chattel mortgage to secure the payment of a note dated September 20, 1900, and payable six months after date, for the sum of \$4,000 and interest. Jervis and his wife, on September 15, 1900, made the affidavit required by the statute that the mortgage was made in good faith to secure the amount named therein, and without design to hinder, delay, or defraud creditors, and acknowledged the execution of the mortgage. The instrument was filed in the office of the clerk and recorder of Park county September 19, 1900. The plaintiff at all the times mentioned in the complaint was a corporation under the banking laws of the United States, and no affidavit was made to this mortgage by any officer of the plaintiff in its behalf.

On March 19, 1901, the cashier of the bank made affidavit for the renewal of the mortgage, and this was filed March 20, 1901, in the office of the county clerk and recorder of Park county. This affidavit, omitting the formal parts, is as follows: "That said bank is the mortgagee in that certain chattel mortgage dated September 20, 1900, wherein John Jervis and Caroline Jervis are mortgagors. Said chattel mortgage secures a promissory note of the sum of four thousand dollars (\$4,000), dated at Livingston, Montana, September 20, 1900, due six months after date. That said mortgage was filed in the office of the county clerk and recorder of Park county, Montana, on the 19th day of September, 1900, 8:45 a. m. That there is justly owing at the time of filing this affidavit on said note secured by said mortgage the sum of four thousand dollars, and that said chattel mortgage is hereby extended to the 20th day of September, 1901, and that such debt or obligation was not made or renewed to hinder, delay or defraud the creditors or subsequent encumbrancers of the mortgagors."

It further appears from the findings that the note given to the plaintiff by Jervis and his wife has not been paid, and that the mortgagors remained in the possession of the mortgaged property under the terms of the mortgage, and that the plaintiff was never in possession of the same. Jervis was indebted May 16, 1901, to one Hoppe, in the sum of \$1,928.32. Hoppe commenced action in the district court of Park county to recover the same. A writ of attachment was duly issued out of the court and placed in the hands of the defendant as sheriff, who levied upon and took into his possession the property described in the mortgage. A judgment of the court was given and made February 14, 1903, for Hoppe and against Jervis, for the amount claimed in the complaint. A writ of execution was issued out of the court on the judgment, and all the property attached was sold, and the proceeds of the sale were applied to the satisfaction of the judgment.

It further appears from the findings that the defendant, as such sheriff, did not pay or tender to the plaintiff the amount

of said mortgage debt or interest, and did not deposit the amount thereof with the treasurer of Park county, payable to the order of the plaintiff, before he attached and took the property described in the mortgage into his possession under the writ of attachment. As a conclusion of law from the facts the court finds the mortgage was null and void as to attaching creditors of John Jervis, and that the property described in the mortgage was subject to the levy under the writ of attachment issued in the case of *Hoppe v. Jervis*. From a judgment entered in favor of the defendant this appeal has been prosecuted.

It is admitted that the mortgage was void as to attaching creditors before the affidavit of its renewal was filed. The instrument was not accompanied by the affidavit of plaintiff of good faith, and the statute was not complied with. (Civil Code, sec. 3861; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 813, and cases cited.)

There is one question for decision: Was the mortgage, though void as to creditors at the time of its execution by reason of the failure of the mortgagee to make the affidavit required by law, rendered valid as against attaching creditors, and renewed by the affidavit filed with the clerk and recorder March 20, 1901?

The Code provides that "every mortgage of personal property, made, acknowledged and filed as provided by the laws of this state may be renewed at or before the maturity of the debt or obligation secured thereby," by filing in the office where the mortgage is filed an affidavit of the mortgagee showing certain facts, as provided in section 3866 of the Civil Code. Section 1542, fifth division, of the Compiled Statutes of 1887, is the same as section 3866, *supra*, and was construed in *Cope v. Minnesota T. F. Co.*, 21 Mont. 18, 52 Pac. 617. The court held that an affidavit for the renewal of a chattel mortgage conformed to the statute, and said: "When said affidavit was

filed in the office where the original mortgage therein described was filed, and when the clerk and recorder of deeds of the county in whose office the mortgage was filed attached the affidavit to the mortgage therein described, and noted the date of filing as provided by the statute, thereby the mortgage was renewed, was continued, and became a valid lien, of full force and effect upon the chattels described in the mortgage, for the time specified in the affidavit."

The respondents maintain that the affidavit of renewal before us is incomplete and defective. The statute requires the affidavit to show the time to which the same (debt or obligation) is extended. (Civil Code, sec. 3866.) The affidavit states "that said chattel mortgage is hereby extended to the 20th day of September, 1901." We do not express an opinion upon this point, but assume on this appeal that the plaintiff filed a sufficient affidavit for the renewal of a valid mortgage.

The appellant claims that the statutes governing chattel mortgages should be liberally construed; that the affidavit of renewal contains all the facts necessary to give notice to persons of the existence of the debt owing by the mortgagors to the mortgagee, the lien of the mortgage upon the property therein described, the good faith of the parties; and that in the absence of fraud the omission of the plaintiff to make the affidavit required by the statute has been cured.

Our attention has not been called to any authority in support of the main proposition of appellant that the affidavit of renewal made valid the lien of the plaintiff on the property described in the mortgage as against attaching creditors. Laws regulating chattel mortgages have been enacted in every state, but their provisions are not uniform, although the same objects are accomplished. In decisions involving their interpretation, one principle is adhered to, and that is that statutory requirements intended to protect the lien of the mortgagee on the mortgaged property against attaching creditors must be strictly followed.

The re-filing of a chattel mortgage in some jurisdictions has the same effect as its renewal under our Code, and the authori-

ties treating this subject may aid us in reaching a correct conclusion. Mr. Jones reviews this legislation, and says: "A re-filing of a mortgage must be effected within the time limited for that purpose. It is nugatory if done either before or after that time. A re-filing after that time is not effective to revive and continue the validity of the mortgage for a year after such re-filing. * * * A re-filing after the expiration of the time limited is not equivalent to the filing of a new mortgage, or to the original filing of a mortgage. If the re-filing be not done in strict compliance with the statute, the mortgage becomes void as against creditors and *bona fide* purchasers and mortgagees, and cannot be revived." (Jones on Chattel Mortgages, 4th ed., sec. 287.)

In *Biteler v. Baldwin*, 42 Ohio St. 125, a chattel mortgage was executed February 17, 1879, and duly filed with an affidavit with the proper officer. The mortgage was re-filed September 16, 1879, and another affidavit thereon of the same tenor as the first. The property was sold February 28, 1880, to a party who executed a chattel mortgage in payment therefor; and the court, in deciding that the last instrument had priority, said: "The mortgage * * * filed on February 17, 1879, became a valid lien, as against * * * purchasers from [owner], for one year. By the plain words of the statute, that mortgage became void as to the purchaser after the expiration of one year from the date of its filing, unless within thirty days next preceding the expiration of the year it was re-verified and re-filed, as provided by the statute. There was no such re-verification and re-filing within said thirty days. The verification and re-filing on September 16, 1879, had no effect under the statute. Such re-filing was not intended by the parties, nor did it have the effect, in law, of destroying the lien which commenced on February 17th; neither did it create a new or additional lien, under the same instrument, on the same property, for the same claim."

In *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816, the court, in expounding a statute of New York, said: "With some hesi-

tation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute upon its face furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage and the place of the mortgagor's residence." In *Herder v. Walther*, 9 N. Y. Supp. 926, the court refers to some cases, and says: "Now, *Swift v. Hart* [12 Barb. 530] proceeds upon the theory that a chattel mortgage, after the expiration of the year, becomes dormant as respects *bona fide* purchasers and creditors, but that such instrument may be revived by re-filing it after the expiration of the year. This, we think, in direct conflict with *Marsden v. Cornell*, 62 N. Y. 215. A dormant instrument may be revived and made effectual by the acts of the parties, but an instrument which has ceased to be valid cannot be thus revived by any act of the parties to it."

When the doctrine thus laid down is applied to the provisions of our Code, it will be seen that the contention of the appellant cannot be sustained. The statute is plain, and needs no interpretation. It declares that certain mortgages of personal property can be renewed and continued, and how this may be done. Section 3866, *supra*, limits this right to a mortgage "made, acknowledged, and filed as provided by the laws of this state." The mortgage under investigation was not "made * * * as provided by the laws of this state," and did not affect attaching creditors. The Code provides that when the affidavit of renewal is filed and certain things are done "such mortgage is renewed and continues and is valid and of full force and effect upon the personal property described therein for the time stated in such affidavit, not to exceed one year." (Civil Code, sec. 3866; *Cope v. Minnesota T. F. Co.*, *supra*.) The instrument is not changed by the affidavit of renewal and acts of the county clerk and recorder, but is renewed and continued for a definite time. This mortgage was renewed and

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continued to be good and valid between the parties, but remained null and void as to attaching creditors.

We recommend that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

Affirmed.

32	298
35	131
36	309

DALY BANK AND TRUST COMPANY, RESPONDENT, v.
GREAT FALLS STREET RAILWAY COMPANY ET
AL., DEFENDANTS; L. HAMILTON, APPELLANT.

(No. 2,066.)

(Submitted March 18, 1905. Decided April 4, 1905.)

Statutory Construction—Railways of Commerce—Street Railroads.

Railways of Commerce—Street Railroads—Statutory Construction.

1. Section 707, fifth division, Compiled Statutes of 1887, providing that a judgment against any railway corporation for an injury to person or property, or for material furnished to, or work or labor done upon the property of such corporation, shall be a lien prior and superior to the lien of any mortgage or trust deed, being a part of the Act of March 3, 1887, which treats exclusively of railways of commerce, has no application to street railroads.

Statutory Construction—Intent of Legislature—Context—Object and Remedy.

2. When the words of a statute are not explicit, the intention of the law-making body is to be collected from the context, from the occasion and necessity for it, from the mischief felt and the object and remedy in view.

Statutory Construction—Doubt—How Resolved.

3. Where doubt arises as to the true meaning of a term as used in a statute, that doubt must be resolved not merely by its popular definition, but from the general legislation respecting the same subject matter, having in mind the evident purpose to be accomplished by the legislation.

Appeal from District Court, Cascade County; John W. Tattan, Judge.

ACTION by the Daly Bank and Trust Company of Butte against the Great Falls Street Railway Company and Lizzie

Hamilton. From a judgment for plaintiff, defendant Lizzie Hamilton appeals. Affirmed.

Messrs. Toole & Bach, for Appellant.

Chapter XXV, fifth division, Compiled Statutes of 1887, is entitled "Railroad Corporations," comprehending foreign and domestic, mercantile and street railway corporations. It is general, and any limitation placed upon sections 706 and 707, by the insertion of any word that would change the meaning of the language used, is not warranted and in violation of section 630, first division, Compiled Statutes, *supra*. When Chapter XXV limits its sections to railroads provided for in it, they so express the limitation. When the sections are intended to apply to all or "any railroad" corporation, the language is general and unrestricted. (*St. Louis & C. v. Donahoe*, 3 Mo. App. 550; *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681, 16 S. W. 611; Endlich on Interpretation of Statutes, sec. 76; *Hesterville etc. Co. v. Philadelphia*, 89 Pa. St. 219.)

The language of the statute is, "any railway corporation." That a street railway, when incorporated, is a railway corporation, as much as a commercial corporation, whether propelled by steam or electricity, is without doubt. There is no ambiguity in the phrase and there ought not be any mistake in its interpretation. There can be no question of its technical sense, and its ordinary sense, that is not equally as applicable in the one case as the other. Besides, section 707, *supra*, is limited in its terms to injuries to passengers, and for material furnished and work and labor done, is equally applicable to any railroad corporation, and there can be no distinction made in those particulars between commercial or street railroads. The section makes none, but in express and emphatic terms makes it applicable to "any railway corporation," and no construction should be given it that would confine it to the one, to the exclusion of the other. Had the legislature attempted to exclude street railways and make section 707 ap-

plicable solely to commercial railways, it would have been invalid under the Act of Congress. (Comp. Stats., p. 32.)

"The word 'railroad,' in its broadest signification, includes a street railroad, although it extends over the streets of a single city and is located wholly within the limits of a single county." (*Bloxham v. Consumers' Electric Light etc. St. Ry. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44, 18 South. 444; *Cheetham v. McConnell*, 178 Pa. St. 186, 35 Atl. 631.) The terms "railroad" and "railway" are used interchangeably. (*Commonwealth v. C. P. & R.*, 52 Pa. St. 518; *Hesterville etc. R. R. Co. v. Philadelphia*, 89 Pa. St. 219; *City of Pittsburg v. Passenger Ry. Co.*, 104 Pa. St. 533; *Borough of Milwaukee v. Evergreen Ry. Co.*, 131 Pa. St. 1, 18 Atl. 993; *Gyger v. Philadelphia etc. R. Co.*, 136 Pa. St. 96, 20 Atl. 399; *St. Louis Bolt etc. Co. v. Donahoe*, 3 Mo. App. 559; *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681, 16 S. W. 611.)

For a clear and logical exposition of the construction which ought to be given to the words "railroad company," and such as, in our opinion, should be applied to them as used in section 707, *supra*, see *Lieberman v. Chicago etc. R. Co.*, 141 Ill. 140, 30 N. E. 544; also *Bishop v. North*, 11 Mees. & W. 418; *City of Chicago v. Evans*, 24 Ill. 52; *Clinton v. Railway Co.*, 37 Iowa, 61; *Oler v. Railroad Co.*, 41 Md. 583; *New York Cable Co. v. Mayor etc.*, 104 N. Y. 1, 10 N. E. 332; *Bulton v. Short Route etc. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. 332.

A municipal corporation could not turn over its streets to an individual to be operated for merely private purposes. The franchise must be for public and not private purposes, or, at least, public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses. (*City of San Antonio v. Rische* (1896), 38 S. W. 388; *Elliott on Roads and Streets*, 565.) But it is not an unusual thing for such corporations to include within the objects of their incorporation the construction and maintenance of a railroad, and where such is the case there would be no reason to exclude a mortgage given by such a railroad from the opera-

tion of section 707 requiring it to be filed with the Secretary of State (*County of Randolph v. August T. Post*, 93 U. S. 502, 23 L. Ed. 657); and we fail to discover any force in the point made by counsel that the place described in the Act of 1887 for filing mortgages, to wit, with the Secretary of State, shows that railways operated in a city exclusively were not in the legislative mind.

Mr. W. T. Pigott, for Respondent.

Section 707 does not apply to street railway corporations. Chapter XXV of the fifth division, Compiled Statutes of 1887, comprises all of an Act entitled "An Act to provide for the formation of railroad corporations in the territory of Montana," approved May 7, 1873, and all of an Act entitled "An Act in relation to railroad corporations," approved March 3, 1887. (Comp. St. 1887, pp. 807, 824.) Both Acts, and the entire chapter, are specially applicable to railroads of commerce and general traffic, and do not include or refer to street railways. Examination of the chapter of which this section is a part impels the conclusion that the legislative assembly, in using the term "railway corporation," did not intend to embrace within it a street railway corporation. The conclusion is fortified by a consideration of other statutes, and of the conditions prevailing in 1873 and 1887.

The contention that section 707 has application to street railway corporations, is not a new one. It has been advanced and vigorously urged in other cases. It was so urged in *Massachusetts Loan etc. Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46, in *Central Trust Co. v. Warren*, 121 Fed. 323, and in *Manhattan Trust Co. v. Railway Co.*, 68 Fed. 82. In each of these cases, the court held that street railway corporations are not within the provisions of the section. They are determinative of the sole ultimate question in the case at bar.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1891 the Great Falls Street Railway Company, a New

Jersey corporation, owning and operating a street railway system in Great Falls, Montana, executed a blanket mortgage or deed of trust to secure an issue of bonds in the aggregate amount of \$500,000, to which the Massachusetts Loan and Trust Company was a party as trustee. Bonds to the amount of \$150,000 were issued as of even date with the mortgage, and within two years thereafter other of such bonds in the further sum of \$75,000 were issued, negotiated, and passed into the hands of third parties. Afterward the plaintiff, Daly Bank and Trust Company, was substituted as trustee in the place and stead of the Massachusetts Loan and Trust Company. On February 15, 1896, the defendant Lizzie Hamilton recovered a judgment against the Great Falls Street Railway Company for personal injuries received by her, and on February 12, 1903, that judgment was renewed. This action was commenced in September, 1903, to foreclose the mortgage or trust deed, and defendant Hamilton was made a party, it being alleged in the complaint that "the said defendant Lizzie Hamilton has, or asserts or pretends that she has, some interest in or lien upon the said real property of said railway company, which is inferior to the lien of the said first mortgage or deed of trust." The street railway company defaulted, and defendant Hamilton filed an answer wherein she pleaded the judgment recovered by her against the street railway company, and its renewal, and alleged that the lien of such judgment is prior and superior to the mortgage given by the railway company. The plaintiff thereupon filed a motion for judgment on the pleadings, and this motion was granted, and a decree of foreclosure entered adjudging plaintiff's mortgage to be a lien prior to the judgment lien of the defendant Hamilton, and directing a sale of the mortgaged property in accordance with the provisions of the mortgage or trust deed. From this decree the defendant Hamilton appealed.

Only one question is presented for our determination, namely: Does section 707, fifth division, Compiled Statutes of 1887, apply to street railway companies, so as to render the judgment recovered by defendant Hamilton in 1896 and re-

newed in 1903 a lien upon the railway company's property prior and superior to the mortgage given upon such property by the railway company in 1891? If it does not, the decree should be affirmed; if it does, the decree should be modified, so as to provide for the satisfaction of such prior claim.

Section 707, above, reads as follows: "A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this Act." If considered alone, this section might be deemed sufficiently broad in its terms to include street railway companies as well as the ordinary railways of commerce. But where doubt arises as to the true meaning of the term "railway corporation," as used in that section, the doubt must be resolved not merely by the popular definition of the term "railway," but from the general legislation respecting the same subject matter, having in mind the evident purpose to be accomplished by these enactments.

The legislation in force respecting the matter at the time of the execution of the mortgage involved in this case is comprised in Chapter XXXV (incorrectly printed XXV), fifth division, Compiled Statutes of 1887. Sections 677 to 701, inclusive, of that chapter are sections 1 to 24, inclusive, of an Act entitled "An Act to provide for the formation of railroad corporations in the territory of Montana," passed over the Governor's veto May 7, 1873 (Laws Ex. Sess. 1873, p. 93), and the most cursory examination of these sections at once discloses that none of their provisions were ever intended to apply to street railways. These sections were carried forward into the compilations of 1879 and 1887, and, in substance, are reproduced in the Civil Code of 1895 as sections 891 to 909, inclusive. The remaining sections of this chapter comprise sections 1 to 7, inclusive, of an Act of the Fifteenth Territorial Legislative Assembly entitled "An Act in relation to railroad

corporations," approved March 3, 1887; and, in order to arrive at the legislative intent in enacting section 6 of that Act, which is section 707, now under consideration, it is necessary that the entire Act be considered.

Section 1 (702) provides that any railroad corporation chartered by or organized under the laws of the United States or of any state or territory, whose line of railroad shall reach or intersect the boundary line of Montana, may extend its railroad into Montana from such point, and may build branches from such point or from such extension.

Section 2 (703) provides for the consolidation of any two or more railroad corporations whose respective lines are wholly or partly within the territory of Montana, when their respective lines or any branches so connect that they may be operated together as one property.

Section 3 (704) provides that any railroad corporation whose line is wholly or partly within the territory of Montana, or reaches the boundary line thereof, may lease or purchase the whole or any part of the railroad or line of railroad of any other railroad corporation, provided that such leased or purchased line is continuous of or connected with the line of the purchasing railroad.

Section 4 (705) authorizes any railroad corporation whose line is wholly or partly within the territory of Montana to issue and dispose of such amount and character of special, preferred, or full paid-up stock of the capital stock of such corporation as may be deemed advisable by its board of directors.

Section 5 (706) provides that any railroad corporation whose line is wholly or partly within the territory of Montana shall have authority and power to make, issue, negotiate and deliver its bonds or other evidences of indebtedness, and to secure the payment thereof by mortgage or deed of trust upon all or any part of its property; and provides for the recording of such mortgage in the office of the Secretary of the Territory.

Section 6 is section 707, and is quoted above, and section 7 (708) contains the repealing clause.

The seven sections of this Act herein paraphrased are carried into the compilation of 1887 as sections 702 to 708, inclusive, and include section 707, which is the subject of construction in this case.

If we were to hold that the term "railroad," used in section 707 of Chapter XXXV, above, applies to street railways because the term is sufficiently broad to include any and all graded roads on which rails of iron or steel are laid for wheels of cars to run upon, there is no apparent reason why the same term should not also be so construed wherever it is found in that chapter, and, if so, impossible conditions would be attached. For instance, under section 688 every street railway company would be required to build and complete at least fifteen miles upon each of its lines, branches, or extensions every year subsequent to the filing of its articles of incorporation, until the entire system was completed, under a penalty of a forfeiture of its charter and all rights and privileges conferred by that chapter. Under section 700 such street railway companies would be required to provide comfortable and convenient cars for the transportation of passengers, baggage, express matter, and freight, and to fit its locomotives with bells and steam whistles. Under section 701 every such corporation would be required to file with the territorial auditor a report showing, among a great many other things, the length of its main track, the length of its branches and sidings, the maximum grade of its line, the shortest radius of curvature, with the length of curves in its main road, the number of wooden trestles, the length of the road unfenced on either side, and the reason therefor, the number of its engines, the number of its express and baggage cars, the number of its freight-cars, and very many other things, the merest statement of which is a demonstration of the absurdity of attempting to make them applicable to street railways. The terms "rail-

road" and "railway," as used in this chapter XXXV, are synonymous terms, and are generally to be found employed interchangeably. (*State v. Brin*, 30 Minn. 522, 16 N. W. 406.)

Prior to 1895 we had no statute particularly designating the various purposes for which industrial corporations might be organized in this territory or state; but section 446 of Chapter XXV designated certain purposes, and then contained this provision: "carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof." It is apparent, then, that the purpose of the Act of 1887, above referred to, was to admit lines of railroad into the territory of Montana, to permit the consolidation of certain lines of railroads and the leasing and purchasing of one road by another under certain conditions, all of which was evidently intended to encourage such industrial enterprises as might aid in the development of the territory, which at that time had but few lines of railway within it; and to that end sections 4 and 5 of that Act were adopted to permit such railroad corporations to issue and dispose of their capital stock, and to issue their bonds and secure the payment thereof by mortgages or deeds of trust upon their property, including the franchises, etc. And, having made these provisions, the legislature in its wisdom added section 6, which was carried into the compilation as section 707. When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity, from the mischief felt, and the object and remedy in view. Having authorized such companies to issue their bonds and other evidences of indebtedness and to secure the payment of the same by mortgages upon their property, and the legislature having in mind, doubtless, the known habits of such corporations to begin their operations by borrowing money and securing the payment of it by such mortgages, it then doubtless considered the danger, present or that might possibly arise, whereby a person injured by such a corporation, or one who should do work or labor for it upon its property, would

be remediless when he sought to enforce collection of his claim, unless some provision was made whereby such claim, when litigated, might have preference over such mortgages or deeds of trust. This was evidently the purpose of the legislature; and the Act, if construed as a whole, makes one harmonious legislative enactment, all the provisions of which apply equally to one character of corporations, and no one provision of which can reasonably be segregated from the others and given a construction which would be out of harmony with the general purpose of the Act as a whole.

As further evidence of the legislative intent in enacting section 707, above, and as indicative of the legislative use of the word "railway," it is worthy of note that at the same session of the legislature there was passed an Act entitled "An Act relating to the formation of municipal corporations," approved March 10, 1887. This was a general municipal corporation Act, and comprised one hundred and twenty-six sections, which are to be found in the compilation of 1887 from sections 315 to 440, inclusive. That Act embraces section 325, which undertakes to enumerate certain powers which a city council was given by that Act. Subdivision 14 of this section provides that the city council has power "to regulate and control the laying of railroad tracks, and prohibit the use of engines and locomotives propelled by steam, or to regulate the speed thereof when used." Subdivision 15 authorizes the city council to require any railway, the cars of which are propelled by steam within a city or town, to light the same. Then subdivision 16 is as follows: "To license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established." It is perfectly apparent, then, that the legislators, in using the terms "railroad" and "railway" in subdivisions 14 and 15, used the terms interchangeably, with reference entirely to the railways of commerce; and that when they desired to make any reference to street railroads they made use of the specific term "street rail-

roads." There is no reason, then, to suppose that in enacting section 707 those same legislators used the term "railway" in its technical sense, for it is perfectly apparent that in enacting subdivisions 14 and 15 of section 325 they used it with reference to its popular, and, we may say, generally accepted meaning.

In *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82, the circuit court for the northern district of Iowa had under consideration section 2008, McClain's Code of Iowa, which provides that "a judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D. 1862." The precise question was there presented as is presented in the case at bar, and after a careful consideration of the authorities and the proper construction to be given to the legislative enactment under consideration it was held that the term "railway," as therein used, had no application whatever to a street railway. It is evident that the same argument was made before that court that was urged here—that certain of these sections, if construed apart from the others, are broad enough to include, and ought to be held to include, street railways. The court, however, disposes of that contention and the merits of the case in the following language: "The conclusions reached are that, as there is, in fact, a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, Title 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chap-

ter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically named therein, and there is nothing in the context of the chapter or in the text of the original Act of 1862 which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way, and liability for injuries caused to others, shows clearly that the legislature did not intend to include street railways within the provisions of chapter 5, title 10, and that the court cannot so include them."

In 1895 the supreme court of Minnesota, in *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608, 63 N. W. 1099, 29 L. R. A. 208, construed chapter 13, page 69, of the General Laws of 1887 of Minnesota, which, among other things, provides that every railroad corporation owning or operating a railroad in that state shall be liable for all damages sustained by any agent or servant thereof by reason of negligence of any other agent or servant, without contributory negligence, etc., and by a consideration of the other sections of the same act reached the conclusion that the provision above referred to has no application to street railways.

In 1898 practically this same case was before the circuit court of appeals. This appellant, Hamilton, having secured her judgment in the district court, went into the federal court in a suit in equity to enforce her judgment against the property of the Great Falls Street Railway Company, and sought to have the same established as a lien prior to the lien of mortgage or deed of trust now under consideration. The circuit court of appeals considered the provisions of section 707 as well as the other sections of Chapter XXXV, above, reviewed the authorities at great length, and reached the conclusion that section 707 has no application whatever to street railways.

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(*Massachusetts Loan etc. Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46.)

In 1903 this same section 707 again came before the circuit court of appeals for consideration in the case of *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289. Warren secured a judgment for personal injuries sustained by him against the Helena Power and Light Company, upon which the Central Trust Company held a mortgage or deed of trust given prior to the date of Warren's judgment. In a suit in equity to foreclose that mortgage Warren was made a party defendant. He pleaded his judgment, and sought to have the lien of the judgment declared prior and superior to the lien of the mortgage, and Knowles, District Judge, so held, and entered a decree providing for the foreclosure of the mortgage, for a sale of the property thereunder, and for the satisfaction of Warren's judgment before anything was applied toward the satisfaction of the debt secured by the mortgage. On appeal to the circuit court of appeals this judgment was reversed, and it was again held that section 707 has no application to street railways.

While these adjudications by the federal courts are not controlling with us, on account of the high character of the courts they are persuasive, and the reasons given by them seem in this instance conclusive. As the proper construction of this section is the only question before us, we are of the opinion that it cannot be held to embrace street railways, and that the district court committed no error in rendering judgment upon the pleadings. The judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

Rehearing denied, May 3, 1905.

ETTIEN, RESPONDENT, v. DRUM, APPELLANT.

(No. 2,078.)

(Submitted March 21, 1905. Decided April 10, 1905.)

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32	311
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*Sales—Range Cattle—Brands—Validity—Delivery—Subsequent Purchaser—Statutes—Custom.**Claim and Delivery—Instructions—Sales—Cattle—Delivery.*

1. Where, in an action in claim and delivery to recover certain cattle, both parties claimed under the same seller, a requested instruction that plaintiff, whose purchase was prior in time, was not entitled to recover any of the cattle except such as had been delivered and "paid for by him," was properly refused, a vendee not being required to pay for property purchased by him in order to make the transaction valid.

Custom—Statutes.

2. A custom cannot vary the terms of, or operate to abrogate or repeal, a general statute.

Sales—Personal Property—Delivery—Presumptions.

3. Held, that Civil Code, section 4491, providing that a transfer of personal property, not accompanied by immediate delivery and followed by actual and continued change of possession is conclusively presumed fraudulent and void as against a subsequent purchaser in good faith, applies to a sale of range cattle.

Sales—Range Cattle—Brands—Partial Delivery—Custom.

4. Where one purchases an entire herd of range cattle together with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of the remnant not delivered.

Statutes—Holding Applicable—Consequences.

5. A statute will not be held inapplicable to a given state of facts merely because it works a hardship upon some one.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by William Ettien against H. B. Drum. From an order denying him a new trial, defendant appealed. Reversed.

Mr. W. M. Johnston, for Respondent.

The title to the cattle in question passed to respondent when the brand was transferred to him by delivery of the bill of sale.

The ownership of cattle running upon the common range is determined by the ownership of the brand. Section 4191 of the Civil Code does not require any such impossibility as the actual delivery of every animal running on the range where the whole band of cattle with the brand has been transferred. (*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707.) Where cattle are on the range actual possession is in no one; constructive possession accompanies the title. (*Budd v. Power*, 9 Mont. 99, 22 Pac. 499; *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707.) Branding stock furnishes evidence of its ownership. (*Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, and note, 16 Pac. 876.)

Custom, within the meaning of the law, if general, is incorporated into and becomes a part of every contract to which it is applicable; if local, of every contract made by parties having knowledge of or bound to know its existence. (*Sawtelle v. Grew*, 122 Mass. 229; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444; *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. 463; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. 1; *Robinson v. United States*, 13 Wall. 336; *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 48 Am. St. Rep. 140, 40 Pac. 431; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 35, 54 N. W. 50; Code of Civil Proc., sec. 3146, subd. 12.) Deaton was engaged in the business of buying and selling range cattle, and therefore is presumed in law to have knowledge of any custom or usage in relation to said business, whether local or general. (*Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211, 11 N. E. 593, 596.)

A dealer is bound to inform himself of a general and well-established usage of his trade or craft. (*Norris v. Insurance Co. of North America*, 3 Yeates, 84, 2 Am. Dec. 360; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407-412; *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507; *Lupton v. Nichols*, 28 Ind. App. 539, 63 N. E. 477.) Deaton had experience as a

cattleman. He testified as a witness in the case and did not deny that he knew of the alleged custom. In such case he is presumed to know of the custom proved. (*Everett v. Indiana Paper Co.*, 25 Ind. App. 287, 57 N. E. 281.) Evidence of usage is admissible for the purpose of annexing incidents to contracts. (*Boorman v. Jenkins*, 12 Wend. 566, 27 Am. Dec. 158-162; *Andrews v. Roach*, 3 Ala. 590, 37 Am. Dec. 718; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612; *Hayes v. Union Mercantile Co.*, 27 Mont. 264, 70 Pac. 975; *Hinchhorn v. Bradley*, 117 Iowa, 130, 90 N. W. 592; *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1010.) Evidence of one witness is sufficient to establish custom. (*Robinson v. United States*, 13 Wall. 336, 20 L. Ed. 653; *Abbott's Mode of Proving Facts*, p. 597, par. 6.) Evidence as to usage need not be "clear, uncontradictory and distinct"; if there is evidence of the alleged usage the question as to whether it exists is for the jury. (*Hinchhorn v. Bradley*, 117 Iowa, 130, 90 N. W. 592; *Powell v. Luders*, 84 Minn. 372, 87 N. W. 940; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.)

Mr. Fred H. Hathorn, and *Mr. Harry A. Groves*, for Appellant.

Where there is a contract of sale and anything remains to be done by the vendor to complete the contract, such as identifying the property sold or the delivery of possession, in absence of an agreement to the contrary, the title does not pass from the vendor to the vendee until such acts are performed. (*Benjamin on Sales*, 7th ed., p. 293; *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642; *Rosenthal v. Kahn*, 19 Or. 571, 24 Pac. 989.) For the cattle not delivered respondent's only remedy was a right of action for damages for breach of contract against Deaton. (*Benjamin on Sales*, 7th ed., §20.) But even if the title to the cattle in question had passed to the respondent at the time of the contract, still respondent could not recover as against a *bona fide* purchaser unless there was an immediate delivery followed by an actual and continued change of posses-

sion. (Mont. Civil Code, sec. 4491; *Byxbee v. Deury* (Cal.), 47 Pac. 52; *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81; *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707.) To permit a custom to govern in relation to dealings of parties it must be general, reasonable, uniform, certain, ancient and known by the parties or sufficiently notorious to warrant the legal presumption that they knew of it. (*Randall v. Smith*, 63 Me. 105, 18 Am. Rep. 200, and note; *Dickinson v. Gray*, 7 Allen, 29, 83 Am. Dec. 656, and note; *Nelson v. Southern Pacific Co.*, 15 Utah, 374, 49 Pac. 644; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *McBee v. Caesar*, 15 Or. 62, 13 Pac. 652; *Laver v. Hotaling*, 115 Cal. 613, 46 Pac. 1070.)

Evidence to establish a custom must show all the essentials, as above enumerated, requisite to a valid custom. (*Fitzgerald v. Hansen*, 16 Mont. 474, 41 Pac. 230; *Kendall v. Russell*, 5 Dana (Ky.), 501, 30 Am. Dec. 696; *Hayward v. Middleton*, 3 McCord, 121, 15 Am. Dec. 615; *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261; *Brown v. Gill & Fisher*, 50 Fed. 941; *Hibbard v. Peck*, 75 Wis. 619, 44 N. W. 641; *Savage v. Pelton*, 1 Colo. App. 148, 27 Pac. 948; *Adams v. Manufacturers' etc. Fire Ins. Co.*, 17 Fed. 630; *Van Hoesen v. Cameron*, 54 Wis. 609, 20 N. W. 609; *Cleveland etc. Ry. Co. v. Jenkins*, 174 Ill. 398, 66 Am. St. Rep. 296, 51 N. E. 811.) The respondent's evidence is insufficient to establish a custom.

A custom will not be heard to affect the terms of a statute. (Mont. Civil Code, sec. 4491; *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107, 100 Am. Dec. 621, and note; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656.) A general custom will not be heard to vary, add to, or contradict the terms of an express contract. (*Keefe v. Dorland*, 16 Mont. 16, 39 Pac. 916; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656, and note; *Boorman v. Jenkins*, 12 Wend. 566, 27 Am. Dec. 158, and note; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196; *Randall v. Smith*, 63 Me. 105, 18 Am. Rep. 200, and note;

Orient Mutual Ins. Co. v. Wright, 23 How. 401, 16 L. Ed. 524; *National Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *First National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Gilbert v. McGinnis* (Ill.), 28 N. E. 382; *O'Donohue v. Leggett*, 134 N. Y. 40, 31 N. E. 269; *Louisville & C. Packing Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826; *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. 901; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. 514; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 679, 45 Pac. 7; *Salomon v. McRae*, 9 Colo. App. 23, 47 Pac. 409; *Vollrath v. Crow*, 9 Wash. 374, 37 Pac. 474; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Baltimore Baseball etc. Co. v. Pickett*, 78 Md. 375, 44 Am. St. Rep. 304, 22 L. R. A. 690; *Williams v. Insurance Co.*, 24 Fed. 767; *Lowenfeld v. Curtis*, 72 Fed. 105; *Turnbull v. Citizens' Bank*, 16 Fed. 145; *Eaton v. Gladwell*, 108 Mich. 678, 66 N. W. 598; *Isaksson v. Williams*, 25 Fed. 645.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery, brought by Ettien against Drum to recover the possession of forty-four head of range cattle, or for their value in case delivery of possession could not be made. In his answer the defendant denies that plaintiff, Ettien, was the owner or entitled to the possession of any of the cattle, and then sets forth that he himself purchased the cattle in controversy on October 1, 1900, from William Deaton and Austin Warr, who were the owners and in possession of the cattle at the time of his purchase, and that he paid for them a valuable consideration, and took and thereafter retained possession of them. The plaintiff, by his amended reply, alleges that in July, 1900, William Deaton was the owner of a herd of range cattle, about seven hundred and sixty head; that at that time Deaton sold such cattle to the plaintiff; that the cattle were to be delivered in two deliveries at Utica, Montana; that on or about August 5, 1900, Deaton did deliver to

Ettien six hundred and seven head of such cattle, and the same were then paid for at the agreed price per head, and on or about September 1st ninety-eight head more were delivered and paid for; that at the time the contract of sale was made it was agreed between Deaton and Ettien that no new brand or vent or tally mark should be placed on the cattle, but that Deaton was to sell all his cattle bearing the pitchfork brand, together with that brand, and a bill of sale to this effect was executed and delivered by Deaton to Ettien. It further appears from the evidence that soon after this second delivery Deaton appeared at Ettien's place with the cattle in controversy, claiming that they constituted the remnant of the herd which he had been unable to include in either of the two deliveries made, and offered to deliver them; but in the absence of Ettien himself his foreman refused to accept the cattle, and Deaton then sold them to Drum, who paid for them, and took and retained their possession until this action was brought the following spring.

The cause was tried to the court sitting with a jury, and among other instructions given by the court at the request of the plaintiff is No. 9, which reads as follows: "If you find from the evidence that William Deaton and Austin Warr, or either of them, on or about July 24, 1900, were the owner or owners of all cattle branded with the pitchfork brand, including the cattle involved in this action, and on that date sold all of such cattle to plaintiff, and at the same time sold plaintiff the said pitchfork brand and the right to use the same, and you also find from the evidence that under the terms of said sale there were to be only two deliveries of said cattle, that such deliveries were made, the cattle counted out, and paid for by the plaintiff, and you further find that there was at that time a general custom and usage among cattlemen in that section of the country where plaintiff and the said Deaton resided and where the transaction in question took place that where an entire herd of cattle branded with a certain brand, together with the brand, is sold to any person, the cattle to be counted out and

delivered in certain specified deliveries, and such deliveries are made, the cattle counted out, and paid for by the buyer, that thereafter all cattle found on the range branded with the brand in question belong to the buyer of said cattle and said brand, regardless of whether or not said cattle may have been actually included in either of the deliveries specified, then you are instructed that you should find a verdict for the plaintiff in this action." The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon. From an order denying his motion for a new trial, the defendant, Drum, appealed.

In his brief appellant specifies three errors:

1. Error of the court in refusing to give an instruction to the effect that the plaintiff was not entitled to recover any of the cattle described in the complaint, except such as may have been delivered to him by Deaton and paid for by the plaintiff. The instruction was properly refused. We know of no rule of law which requires a vendee to pay for property purchased by him at the time of its delivery in order to make such transaction valid.

2. Error is predicated upon the action of the court in permitting evidence to be introduced as to a custom prevailing in that part of Montana with reference to the ownership of the remnant of a herd of cattle, where it was intended to sell the entire herd and the brand, and where some of the herd was never actually delivered. Objection is made to our considering this specification, for the reason that the particular ground urged here was not included in defendant's objection to the testimony when offered. It is, however, not necessary for us to consume time in considering this, as the same question is properly saved by an objection to instruction No. 9, above.

3. Does instruction No. 9 state the law applicable to this case? We are of the opinion that it does not; that the theory adopted by the trial court in this regard was erroneous, and that the effect of such an instruction was to hold that section 4491 of the Civil Code is not applicable to a sale of the char-

acter of the one made by Deaton to Ettien. At the time of this sale Deaton was in possession of the entire herd of cattle which he sought to transfer to Ettien, and as between the parties such sale was valid; but there is no controversy here as between those parties, but between the original vendee, Ettien, and Drum, a subsequent purchaser.

The theory of the plaintiff, and that adopted by the court as disclosed by instruction No. 9, above, is that where one purchases an entire herd of range cattle and the brand, but some of such cattle are not actually delivered, the purchaser nevertheless becomes the owner of the remnant of the herd, or of that portion not delivered; and this theory is based upon a custom to that effect, which it was sought to show prevails throughout Montana, or at least throughout that portion of the state where these transactions took place. Curiously enough, it was sought to show that Deaton knew of this custom, or from his occupation or surroundings ought to have known of it; but no effort whatever was made to show that Drum, the party directly interested in this controversy, either knew of the prior sale or of such custom. But, in our view of the case, this becomes immaterial. It does, however, appear that some of these cattle—four or five at least—were actually included in one or the other of the two deliveries which were made.

The terms of section 4491, above, are too plain for controversy. Every transfer of personal property, if made by a person having at the time the possession or control of such property, if such transfer is not accompanied by immediate delivery and followed by an actual and continued change of possession of the thing transferred, is conclusively presumed to be fraudulent and void as against a subsequent purchaser in good faith. It is elementary that a custom cannot vary the terms of, or operate to abrogate or repeal, a general statute. (*Penn v. Oldhauber*, 24 Mont. 287, 61 Pac. 649; 12 Cyc. 1054, and cases cited.) Therefore, if this statute applies to a sale of range cattle, it is quite immaterial what the custom may have been in fact in that neighborhood. The question as to whether

or not Drum was a subsequent purchaser in good faith was one of fact, to be determined as other questions of fact; and, this done, it became the duty of the court to give to the jury an instruction embodying section 4491, above, or the substance of it, or to say to the jury that, as against a subsequent purchaser in good faith, Ettien could only recover such of the cattle in controversy as had actually been delivered to him.

It may be true that a hardship is worked by applying the provisions of section 4491 to a sale of the character made by Deaton to Ettien, but we cannot hold a law inapplicable merely because it works a hardship upon some one. Neither can we say that a statute which specifically includes every species of personal property does not apply to range cattle.

Numerous cases may be found wherein it is decided that particular acts did or did not constitute a delivery, but it is unnecessary to refer to them, for in this instance there is no pretense that anything whatever was done toward the delivery of the remnant of this herd, and we undertake to say that no decision can be found which justifies Ettien's claim of ownership to such of these cattle as were never delivered to him, as against the claim of a subsequent purchaser in good faith. The order overruling the motion for a new trial is reversed, and the cause remanded to the district court, with directions to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

32	330
33	480
34	147
34	151
34	486

32	320
36	415

32	320
180	343

GILLIES, APPELLANT, v. CLARKE FORK COAL MIN-
ING COMPANY, RESPONDENT.

(No. 2,074.)

(Submitted March 30, 1905. Decided April 10, 1905.)

*Master and Servant—Injuries to Servant—Vice-principal—
Fellow-servants — Evidence — New Trial — Statement —
Specification of Errors—Headings—Insufficiency of Evi-
dence.*

Appeal—New Trial—When Order Granting It will be Affirmed.

1. Where an order granting a new trial is general, it will be affirmed if either of the grounds assigned in support thereof is sufficient.

Appeal—New Trial—Specifications—Headings.

2. While, in a statement on motion for new trial, specifications of error should be arranged separately under appropriate headings so as to avoid confusion and lessen the labor of re-examination in the trial and appellate courts, still such headings, or any headings, are not absolutely necessary to entitle the moving party to a hearing.

Appeal—Action for Injuries—New Trial—Specifications.

3. All the errors specified in a statement on a motion for a new trial, in an action to recover damages for personal injuries, were under the heading, "Specifications of Errors Occurring at Said Trial." The first specification was that there was no evidence that the defendant, or any officer thereof, failed to provide suitable appliances, or provided unsafe apparatus, so as to cause the injury alleged in the complaint, nor was there any evidence that a certain witness was other than plaintiff's fellow-servant, etc. Then followed three other assignments questioning the sufficiency of the evidence, followed by others directed at the instructions. *Held*, that the first four specifications of error were not fatally defective, in that they were designated by the title as errors occurring at the trial, while in fact they were assignments of particulars wherein the evidence was insufficient to sustain a finding, as provided by Code of Civil Procedure, section 1173.

Appeal—Action for Injuries—New Trial—Statement.

4. Where, in an action for injuries to a servant, the principal controversy was whether defendant was guilty of any negligence in providing suitable appliances, and its liability rested on the question whether A was a fellow-servant or was acting for the defendant as a vice-principal, a specification of error in the statement for new trial that there was no evidence that A was an officer of defendant, that he stood in any other relation than that of fellow-servant to plaintiff, or that defendant was in any wise bound by his conduct in making an alleged change of a rope and snatch-block attached to the hoisting apparatus, the breaking of which caused the injury, sufficiently pointed out wherein the evidence was insufficient, as required by Code of Civil Procedure, section 1173.

Action for Injuries—Evidence—Negligence—Fellow-servant.

5. In an action for injuries to a servant, evidence *held* insufficient to show that A, by whose alleged negligence plaintiff was injured, was acting for the defendant as a vice-principal, and not as plaintiff's fellow-servant.

Appeal—Request for Additional Instructions.

6. Where the instructions of the court fairly cover the case, and are correct, the judgment will not be reversed because all the phases of the case are not covered by them, where no additional instructions covering the particular point are requested.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by A. P. Gillies against the Clarke Fork Coal Mining Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Mr. Sydney Fox, and M. T. J. Walsh, for Appellant.

When the granting of a new trial is regulated by statute, the statute must be pursued, and if it is not and the court grants a new trial, the order will be reversed on appeal. (*Budd v. Davis*, 50 Cal. 120; *Anderson v. Medbery* (S. D.), 92 N. W. 1087; *Carr etc. Co. v. Closser*, 27 Mont. 94, 69 Pac. 560; *Woodard v. Webster*, 20 Mont. 279, 50 Pac. 279.) Indeed, the very fact that the statute gives a right of appeal from an order granting a new trial implies an obligation on the part of the appellate court to inquire into the sufficiency of the reasons urged below moving the court to make the order. There is still left in the trial court, however, a wide discretion in granting a new trial when the notice of intention and statement are prepared in such a way as to present the sufficiency of the evidence. If it is not, the statute in express terms commands the trial court to disregard it as to that feature. (Code of Civil Proc., sec. 1173, subd. 3.) The court below could not legally have considered the sufficiency of the evidence on the hearing of the motion for a new trial, because there are no specifications of particulars in which the evidence is insufficient. As pointed out in the statement, some of the so-called "specifications of errors occurring at said trial" constitute an

attempt to point out particulars in which the evidence is insufficient, but such an assignment is ineffective as a specification of error occurring at the trial, because it is not a specification of error occurring at the trial, and it is not a specification of a particular in which the evidence is insufficient, as a separate ground for a new trial, because it does not purport to be such. The exact proposition here presented was squarely met and determined in the case of *Bardwell v. Anderson*, 18 Mont. 528, 46 Pac. 443; *Schilling v. Curran* (Mont.), 76 Pac. 998; *Mader v. Taylor etc. Co.*, 15 Utah, 164, 49 Pac. 255. Even if the rule laid down in *Bardwell v. Anderson* should be departed from, the sufficiency of the evidence could not be inquired into. With the exception of the first specification, each of them, so far as they refer to the evidence, sets forth what it shows, not the particular in which it is insufficient, and are ineffective, under the repeated adjudications of this court. (*Cain v. Gold Mt. Min. Co.*, 27 Mont. 529, 71 Pac. 1004.) The first specification would be useless even though it were a specification of the insufficiency of the evidence, and not a specification of error occurring at the trial, under the rule of this court asserted in *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

Mr. W. F. Meyer and Mr. John T. Smith, for Respondent.

When specifications as to the insufficiency of the evidence notify the opposing counsel and advise the court, in plain language, of the matters that would be urged on the hearing of the motion, they are sufficient. (*Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142; *American etc. Co. v. Packer*, 130 Cal. 461, 62 Pac. 744; *Drathman v. Cohen*, 139 Cal. 310, 73 Pac. 181; *Patton v. Hyde*, 23 Mont. 23, 57 Pac. 407.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by appellant to recover damages for personal injuries alleged to have been suffered by him while in

the employ of the defendant, through its negligence. Plaintiff is a carpenter, and, at the time he was injured, was engaged with others in the erection of an approach to a tippie at the coal mine of the defendant. It is alleged that "the said defendant, while plaintiff was in its employ as aforesaid, disregarding its duty to furnish or provide a safe, good and secure means by which plaintiff might or could ascend or descend from said trestle or approach by means of a good, secure, and safe apparatus or appliance, negligently and carelessly furnished and provided a defective and unsafe appliance or apparatus, consisting of a one-inch rope run through a snatch-block, which defendant well knew and had full knowledge was unsafe, defective, and insecure, but of which defects, insecurity, and unsafeness the plaintiff had no notice or knowledge." It is further alleged that, at the time the injury occurred, the plaintiff was descending from the trestle by means of said appliance, and that by reason of its defective character the rope pulled through the snatch-block, and caused the plaintiff to fall a distance of fifty feet, whereby he was injured, without fault on his part, resulting in great mental and bodily pain and permanent disability. The defenses relied upon by the defendant are a denial of the negligence charged or any negligence, and contributory negligence on the part of the plaintiff. The trial in the district court resulted in a verdict for plaintiff. On motion of defendant, a new trial was granted. The plaintiff has appealed. The motion was made on several of the statutory grounds, but the only errors assigned in the statement are insufficiency of the evidence to sustain the verdict, and error of the court in submitting certain instructions to the jury. The order granting the motion is general. Therefore, if either of the grounds assigned in support of it is sufficient, the order must be affirmed. (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.)

1. The contention is made by the appellant that the statement presented in support of the motion contains no specification of particulars wherein the evidence is insufficient, and that,

in so far as the order may have been granted on this ground, it cannot be upheld. This contention requires some notice of the plan pursued by the defendant in formulating the statement, as well as of some of the specifications touching the insufficiency of the evidence. All the errors specified are found in the statement under the heading "Specifications of Errors Occurring at Said Trial." The first specification is as follows: "There is no evidence that the defendant, or any officer thereof, failed to provide suitable appliances or apparatus, or provided unsafe, defective, or insecure apparatus, so as to cause the injury alleged in the complaint, nor is there any evidence to show that the witness Gust Alvin was an officer of the defendant, or that he stood in any other relation than a fellow-servant to the plaintiff, or that the defendant was in any wise bound by the conduct of said Alvin in the alleged change of the rope and snatch-block." Then follow three others, questioning the sufficiency of the evidence. The ten remaining are directed at the instructions. None of the first four specifications, counsel says, may be treated as specifications of particulars wherein the evidence is insufficient, because none of them purport to be such, all being entitled, "Errors Occurring at the Trial"; nor may they be treated as assignments of errors of law, because they do not present questions of law. In other words, being attempts to point out particulars wherein the evidence is insufficient, and yet being designated by their title as errors of law, they cannot be considered for any purpose.

The statute relating to the form of the statement (Section 1173, Code of Civil Procedure), requires a specification of the particular errors relied on, and, if the ground of the motion is insufficiency of the evidence to justify the verdict or other decision, the particulars must be pointed out wherein the evidence is alleged to be insufficient. A bill of exceptions need not specify errors of law; otherwise it must be the same in form as the statement. (Code of Civil Proc., sec. 1152.) A moment's consideration of the matter leads to the conclusion that the specifications should be arranged separately under appro-

priate headings. This course avoids confusion, and lessens the labor of re-examination of the case, both in the trial court and in this court. But appropriate headings or any headings are not absolutely necessary. (*Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.) If specifications are arranged in consecutive order, without any heading or under a general heading, as in this case, and it is readily apparent what errors are intended to be assigned, we think the moving party has presented a case which entitles him to a hearing.

The general title here used for the specifications does not in any way confuse the different classes of specifications. A new trial may be granted on the grounds of error materially affecting the substantial rights of the party aggrieved. Among these are errors of law committed by the court during the trial, and errors of fact committed by the jury, when the case is submitted to a jury, or by the court, when the trial is had without a jury. If the facts are not, in the opinion of the court, sufficient to justify the verdict or decision, then it should order another trial, for a finding without sufficient or any evidence to support it is error occurring during the trial, in the same sense that an erroneous ruling of the court upon a substantial matter is an error. Both are errors occurring at the trial. Hence the designation, "Errors Occurring at the Trial," as used by the respondent in its statement in this case, does not change the character of any specification, nor lead to any confusion or misapprehension.

The appellant cites *Bardwell v. Anderson*, 18 Mont. 528, 46 Pac. 443, and *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998, as conclusive in favor of his contention. We do not think they apply. In this case the designation is, generally, "Errors Occurring at the Trial." In *Bardwell v. Anderson* the specification itself stated, "The court erred in finding," etc., followed by an attempt to point out the particulars wherein the evidence was insufficient. This was held to be an ineffective attempt to specify an error of law, and therefore was properly

disregarded. So, in *Schilling v. Curran*, under the heading "Assignment of Errors," the specification recited: "The court erred in making finding of fact No. 2, etc., * * * there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same; and said finding No. 2 is contrary to the evidence, and wholly unsupported thereby." Following the decision in *Bardwell v. Anderson*, we held this wholly insufficient as a specification of error of law occurring at the trial. It was also clearly ineffective and insufficient as a specification of the insufficiency of the evidence, because it stated a bare conclusion of counsel, in opposition to the finding of the court and jury. These decisions are supported by the text of Hayne on New Trial and Appeal, page 426, and the cases cited in both opinions.

2. But even so, counsel says, the specifications do not point out the particulars wherein the evidence is insufficient, within the requirements of the statute as construed by this court. We refrain from entering into an analysis of the evidence, and from expressing an opinion thereon, except so far as it may be necessary to a decision of the question before us.

The principal controversy in the evidence was whether the company was guilty of any negligence in providing suitable means to ascend to and descend from the tippie during the course of the work. Its liability in any event rests upon the question whether one Alvin was a fellow-servant of the plaintiff, or was acting for the company as a vice-principal. For on the day of the accident, and about an hour before it occurred, he had exchanged the snatch-block theretofore in use, which it is claimed was safe, for one which it is alleged was unsafe and dangerous, without notice to plaintiff. If this be true and Alvin was not a fellow-servant, but the vice-principal for the company, the defendant is liable. On this point the evidence is exceedingly meager. Indeed, it may be said that there is in the record no substantial evidence upon which a conclusion may be based as to the position he really did occupy. Some of

the witnesses state the bald conclusion that he was foreman for the company. It does not appear, however, from any detailed statements of the facts by any witness, what authority he had, what control he exercised over the work, or what control he had over the men. It does appear, on the other hand, that he worked as a carpenter, just as did the other men, only one instance appearing in the evidence where he directed any of the men, and that was immediately before the accident. Being engaged in fitting some timbers upon a lower part of the tippie, and needing help, he called to the plaintiff to come and assist him. In descending to that part of the structure, by means of the rope and snatch-block, the plaintiff fell and was hurt.

In order to hold the defendant liable under these circumstances, the jury must have found, under the court's instructions, that Alvin was a vice-principal, and that the plaintiff was not guilty of contributory negligence. As there was no evidence from which it could be inferred that he was a vice-principal, the plaintiff's case did not warrant a verdict in his favor. The specification points out distinctly the absence or total want of evidence on this point to justify the conclusion reached by the jury, and must therefore be held sufficient, for it falls within the rule of the case of *Strasburger v. Beecher*, 20 Mont. 143, 49 Pac. 740, though not, perhaps, within the strict rule followed in *First National Bank v. Roberts*, 9 Mont. 323. It "certainly gave the plaintiff notice, and advised the court, in plain language, of the matters that would be urged on the hearing of the motion." (*Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407; *Harnett v. Central Pacific R. Co.*, 78 Cal. 31, 20 Pac. 154.)

If there is no evidence to support a particular finding or decision, it is certainly competent to say so, for the statement of this fact indicates clearly the particular point wherein the evidence is deficient. This form of specification would in the particular instance seem to meet every requirement of the law (*Knott v. Peden*, 84 Cal. 299, 24 Pac. 160), and has been held effective even where there is slight, but insufficient, evidence to

support the finding. (*Owen v. Pomona L. etc. Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.) "It is difficult to suggest anything more or different that one could say by way of specification in such case. But one should be sure of his ground before making and standing upon such bold and bare a specification in regard to a material finding or fact implied in a verdict. And care must always be taken that such bare negation is not too broad. It must not, any more than any other kind of specification, amount to a mere attack upon the general decision." (Spelling on New Trial and Appellate Practice, sec. 434.) Upon this ground of the motion the action of the trial court was clearly correct. A new trial should have been granted.

3. The other specifications of the insufficiency of the evidence are criticised by counsel for appellant, but, having reached the conclusion that the first specification is sufficient, it is not necessary to notice these criticisms. Nor is it necessary to notice or comment upon the errors assigned upon the instructions. Speaking generally, the criticism made of the instructions does not question their correctness as abstract propositions. The complaint made is that they fail to state all the law applicable to the case. It is well settled in this jurisdiction that, if the court's instructions fairly cover the case and are correct, the judgment will not be reversed because all the phases of the case are not covered by them, unless counsel shall have requested the court to submit additional instructions covering the particular point. (*State v. Broadbent*, 19 Mont. 467, 48 Pac. 775; *Helena & Livingston Smelting etc. Co. v. Lynch et al.*, 25 Mont. 497, 65 Pac. 919, and cases cited.)

The order granting a new trial is affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

COLLINS, RESPONDENT, v. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

(No. 2,084.)

(Submitted March 22, 1905. Decided April 20, 1905.)

Life Insurance—Warranties—Breach—Premiums—Default—Waiver—Agents—Authority—Evidence—Interpretation of Words.

Life Insurance—Assured “Connected” with Sale of Liquors—Forfeiture.

1. Where, in an action to recover the amount of an insurance policy, it appeared that the assured had represented in his application for the policy that he was not in any way connected with the manufacture or sale of spirituous liquors, the word “connected” must be presumed to have been used in its popular sense (section 2209, Civil Code), involving the idea of permanency; so that proof that assured occasionally waited on the customers of a saloon-keeper, for the latter’s accommodation and without compensation—the assured having no interest whatever in the saloon—did not establish such connection with the business as to make his negative statement in the application a misrepresentation which would work a forfeiture of the policy.

Life Insurance—Materiality of Representations Claimed to be False.

2. *Obiter*: The materiality of representations, made by the assured in an application for a life insurance policy, claimed by the insurer to be false, and the question whether the applicant acted in good faith, are of no importance—they being determined by the stipulations in the contract, and their truth or falsity made determinative of the rights of the parties.

Life Insurance—Acts of Agent—Liability of Insurer.

3. *Obiter*: Where, by the terms of a life insurance policy, the statements contained in the application are made a part of it as conditions precedent, and the assurer assumes the risk only on the faith that they are true, the latter does not become liable where the agent or solicitor knows that the representations made are not true, when under the terms of the contract he has no authority to waive any requirement in this regard made by the principal.

Life Insurance—Premiums—Nonpayment—Waiver.

4. Where a life insurance policy provided that any forfeiture for nonpayment of a premium could be waived only by a writing signed by an officer of the insurance company, an agreement between the assured and the company’s local agent that quarterly premiums due on the 6th of certain months could be paid as late as the 22d of such months, was not within the apparent scope of the agent’s authority and therefore not binding on the company.

Insurance—Contents of Policy—Presumptions.

5. The assured is presumed to know, and it is his duty to read, the contents of a policy and all conditions and limitations therein contained.

Insurance—Acts of Agent—Ratification—Presumptions.

6. Under a contract of insurance which provided that none of its conditions could be varied or modified by an agent except by agreement in writing signed by an officer of the insurance company, the assured is presumed to know that any engagements he may enter into with the agent are not binding upon the company unless brought home to and ratified by it.

Life Insurance—Retention of Premium—Ratification—Presumptions.

7. By retaining a premium paid on a life insurance policy two days after it was due, an insurance company is conclusively presumed to have ratified the act of its local agent in receiving it and to have waived a forfeiture of the policy for a noncompliance with its provisions in this regard.

Insurance—Agents—Misrepresentations—Ratification.

8. A misrepresentation by the local agent of an insurance company to it as to the date of payment of a premium, prevented any ratification of the agent's act in receiving it and any waiver by the company.

Life Insurance—Nonpayment of Premiums—Waiver—Estoppel.

9. Premiums on a life insurance policy were payable quarterly on the 6th days of August, November, February and May. The policy provided that it should be void on assured's failure to pay premiums as provided, and that forfeiture could only be waived or premiums in arrears received, by agreement in writing signed by an officer of the company. The insurer received and retained one premium paid two days after being due. *Held*, that by this single act of waiver the company did not estop itself to insist on a forfeiture when payment was made sixteen days after due date thereof, which payment was tendered back but refused.

Insurance—Forfeitures—Waiver—Evidence.

10. The fact that an insurance company waived forfeitures of policies held by other persons is of no evidentiary value, where it is not shown that the holder of the policy in controversy knew of such waivers and that his conduct was influenced by such knowledge.

Life Insurance—Premiums Past Due—Assured in *Extremis*—Concealment.

11. In an action to recover the amount of a life insurance policy, the concealment from the insurer of the fact that the assured was already in *extremis* when a premium past due was offered in payment, was fraudulent, fair dealing requiring that the assured apprise the company of his condition, so that it might intelligently exercise its option in the premises.

Life Insurance—"Connected" with Sale of Liquors—Evidence.

12. Where, in an action on a life insurance policy, the insurer claimed a breach of warranty that assured was not connected with the sale of spirituous liquors, evidence that the latter received no consideration for an occasional service rendered to a saloon-keeper at the bar, was of some materiality as tending to show the exact relation of the assured to the business.

*Appeal from District Court, Lewis and Clark County;
Henry C. Smith, Judge.*

ACTION by John W. Collins against the Metropolitan Life Insurance Company to recover the amount of an insurance

policy. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Reversed.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

The Metropolitan Life Insurance Company of New York on August 6, 1902, issued to August Erickson, of the city of Helena, Montana, a policy of insurance on his life for \$1,000; the consideration being the payment on or before the delivery of the policy of a premium of \$35.06, and the promise to pay a like sum on the 6th of February and August of each year during the continuance of the policy. The assured could not meet the first payment on the date named in the policy, and requested Mr. Thompson, the agent of the company in Helena, who held the policy for delivery, to arrange with the company so that he could pay quarterly instead of semi-annually. The arrangement was effected, and the assent of the company was given in writing that the premiums might be paid in installments of \$17.88 each on the 6th days of August, November, February, and May in each year. In the meantime the first quarterly payment had been made, and the policy delivered. This took place on August 21, 1902. In his application to the company he made certain representations concerning his health, occupation, etc., concluding with a declaration warranting them to be true, and agreeing that they should be made the basis of any contract between him and the company, and that, if any of his statements proved to be untrue, the policy issued to him should be void, and all moneys paid thereon should be forfeited to the company. He further agreed that, inasmuch as only the officers at the home office in the city of New York had authority to determine whether a policy should issue upon any application, and as they acted only on the written statements, etc., contained in the application, no statements, promises, or information made or given by or to the person soliciting or taking the application, or by or to any other person, should be binding upon the company or in any way affect its rights, un-

less such statements, promises or information should be reduced to writing and presented to the officers of the company at the home office. This application, signed by the applicant, was forwarded to the home office, and upon it the policy was issued and delivered, as heretofore stated. It recited that it had been issued in consideration of the answers and statements contained in the application, a copy of which was annexed to and made a part thereof, and also of the premiums paid and to be paid.

Among the statements contained in the application were the following: "(2) My occupation is proprietor of a restaurant, and I have no other occupation except * * * (8) I am not in any way connected with the manufacture or sale of ale, wine or liquor." Among the conditions stated in the policy are the following: "Second. If any statement in the application herein referred to is not true, or if any premium of installment of premium be not paid when due, this policy shall be void. * * * Eighth. The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for this purpose will not be delegated; no other person has or will be given authority." The assured died on June 3, 1903. Soon thereafter the plaintiff was appointed his executor. The policy provides that proof of death shall be made to the home office in the manner and to the extent required by blanks furnished by the company, etc. The plaintiff made seasonable demand upon the company for the necessary blanks, but they were refused. Thereupon this action was brought.

The issues presented at the trial and agitated on the motion for a new trial were whether the policy had been forfeited (1) by reason of false representations of the assured as to his occupation, and his connection with the sale of malt, vinous or alcoholic liquors; and (2) by his failure to pay premiums at

the times specified, or whether his failure to do so had been waived by the defendant. The plaintiff had verdict and judgment. The defendant has appealed to this court from the judgment and an order denying it a new trial.

Mr. E. A. Carleton, for Respondent.

The agent knew full well the connection, such as it was, that defendant had with the sale of liquors. Knowledge affecting the rights of the insured which comes to the agent of the insurance company, while he is performing the duties of his agency in procuring applications for insurance, and delivering policies, and collecting premiums, becomes the knowledge of the company, and, if the latter afterward collects premiums of such parties, it waives all objection with regard to the matters of which it has such knowledge. (May on Insurance, sec. 132; *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528, 16 Atl. 263; *Insurance Co. v. Wolff*, 95 U. S. 326.) Contracts of insurance are always construed most liberally in favor of the insured. (May on Insurance, 2d ed., secs. 175, 178; *Holter L. Co. v. Fireman's F. Ins. Co.*, 18 Mont. 287, 45 Pac. 207.) So odious are forfeitures regarded by the law that the party relying on one must establish a clear case.

General agents have power to extend the time for the payment of premiums, although the policy expressly denies them such authority. (*O'Brien v. Mutual Life Ins. Co.*, 22 Fed. 586; *Standard etc. Ins. Co. v. Friedenthal*, 1 Colo. App. 5, 27 Pac. 88; *Putnam v. Insurance Co.*, 4 Fed. 753; *Ball etc. Co. v. Aurora Ins. Co.*, 20 Fed. 232; *Joliffe v. Madison etc. Ins. Co.*, 39 Wis. 117, 20 Am. Rep. 35; *Terry v. Provident Life Ins. Co.*, 13 Ind. App. 1, 55 Am. St. Rep. 217, 41 N. E. 18; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Boehen v. Williamsburg etc. Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Elkins v. Susquehanna etc. Ins. Co.*, 113 Pa. St. 386, 6 Atl. 224; *Pino v. Merchants' etc. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Universal Fire Ins. Co. v. Block*, 109

Pa. St. 535, 1 Atl. 523; *Lebanon Ins. Co. v. Hoover*, 113 Pa. St. 591, 57 Am. Rep. 511, 8 Atl. 163; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. Rep. 275, 39 N. W. 571, and note; *Dial v. Valley etc. Assn. etc.*, 29 S. C. 560, 8 S. E. 227, and note; *American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159; *Jennings v. Metropolitan etc. Ins. Co.*, 147 Mass. 61, 18 N. E. 601, and cases cited, particularly, *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *McGurk v. Metropolitan L. Ins. Co.*, *supra*; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222.)

"Limitations of the authority of officers to agree to any extension of premiums does not prevent the company being bound by an extension made by an actually authorized agent, and the stipulation against waiver or modification of terms, except in writing, does not prevent the waiver implied by law from conduct amounting to an estoppel. The right to insist on forfeiture may be waived by acceptance of overdue premiums, or by the custom to do so." (2 Current Law Review, April, 1904, No. 2, pp. 495, 496; *Washington Life Ins. Co. v. Berwald* (Tex. Civ. App.), 72 S. W. 436.)

Acceptance of overdue premiums waives forfeiture. (*Bennet v. Union Cent. L. Ins. Co.*, 203 Ill. 439, 67 N. E. 971.) Where a company accepted such premiums, it is estopped from asserting lack of authority on the part of the agent to extend time for payment, although the policy expressly provides against modifications except in a formal manner. (*Union Cent. Life Ins. Co. v. Whetzel*, 29 Ind. App. 658, 65 N. E. 15.) The custom or promise of an agent is sufficient to estop the company (*Continental Ins. Co. v. Browning*, 114 Ky. 183, 70 S. W. 660); and where the course of dealing of the company has been such as to induce insured to believe that it will not be insisted on, the company is estopped from claiming forfeiture. (*Illinois Life Assn. v. Wells*, 102 Ill. App. 514; *Aetna Life Ins. Co. v. Fallow*, *supra*; *Illinois Life Assn. v. Wells*, 200 Ill. 445, 65 N. E. 1072; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Winans v. Allemania Ins. Co.*, 38 Wis.

342; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784.) If there is a waiver of the time of payment, the amount due is not required to be paid or even tendered prior to the death of the insured, and the health certificate cannot be required since the policy does not lapse. (Current Law Review, *supra*, 495; *Illinois Life Assn. v. Wells*, *supra*; *Aetna Life Ins. Co. v. Sanford*, 200 Ill. 126, 65 N. E. 661; *Spoeri v. Massachusetts Life Ins. Co.*, 39 Fed. 752; *Bingler v. Mutual Ben. L. Ins. Co.*, 10 Kan. App. 6, 61 Pac. 673.) Such is the rule in the supreme court of the United States. (*Hartford Life etc. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671; *Phoenix etc. Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18.)

Messrs. Carpenter, Day & Carpenter, for Appellant.

The conditions of the application for insurance in the policy were such as to make the answers to the questions in the application warranties. Where by the terms of a policy answers to the questions in the application are made warranties, the validity of the policy depends upon the literal truth of the answers. It is not a question whether they are material to the risk or not. (*Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348; *Jeffrey v. United Order of Golden Cross*, 97 Me. 176, 53 Atl. 1102; *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. L. 384, 55 Atl. 291; *Standard Life etc. Ins. Co. v. Sale*, 121 Fed. 664.) The materiality of the representation is not a question for the jury. (*Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401.) A number of cases can be found where the question of the materiality of the representation was submitted to the jury, but they arose under policies that did not make the representations warranties. (*High Court Independent Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; *Standard Life etc. Ins. Co. v. Fraser*, 76 Fed. 705.)

It was no excuse for this misrepresentation that the agent knew of it, since by the terms of the application he had no authority to waive it. (*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. Ed. 934, 6 Sup. Ct. 837.) Nor was it material that the decedent did not receive pay for his services. It was the fact of the rendition of the service that made the representation false.

Where the policy provides a method for waiving its express terms, that waiver can only be accomplished by the act or conduct of one or more of the officers named in the policy as those authorized to waive its terms. (*Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. 133; *Modern Woodmen of America v. Tevis*, 111 Fed. 113.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

While several errors are assigned as grounds for the reversal of the judgment and order, the principal question submitted for decision is that of forfeiture. It was presented upon a motion for nonsuit and specifications of the insufficiency of the evidence to sustain the verdict. It is contended by the defendant that the evidence is conclusive on this question in its favor on both the grounds urged in the trial court.

1. The evidence bearing on the question of forfeiture for material misrepresentations to induce the issuance of the policy is the following: The assured was a restaurant-keeper. The room in which he conducted his business was divided by a partition set at a right angle to its length, and pierced by an archway, allowing free passage from the front to the rear. In the front part of the room was a saloon kept by one Nelson. The rear portion of the building was fitted up with a kitchen, dining-room, etc. Entrance was gained to the restaurant by means of a side door going through the kitchen, or through the saloon by means of the archway. Nelson boarded with the assured. Sometimes while Nelson was taking his meals, and in order to accommodate him, the assured would wait on customers at the

bar, going to Nelson to secure change when necessary, but not using the cash till or register. At times, also, when Nelson was called out temporarily during the day, the same accommodation was extended by the assured. The latter had no interest in the saloon in any way, and such occasional service as he thus rendered to Nelson was without compensation. At the time when Thompson, the agent of the defendant company, took the application for the policy, he and one Roberts, a solicitor employed by him, were invited by the assured to drink, and did so, he serving them. At that time Thompson asked him if he had any connection with the saloon. He replied: "Only as you see. When Nelson is away, if anybody comes in, I generally wait on them."

Do these facts show that the assured made false statements as to his connection with the manufacture and sale of spirituous liquors, within the meaning of his declaration contained in the application? It is certainly clear that the assured had no other occupation (that is, no other vocation, calling, employment, trade or business) than conducting the restaurant, for all the witnesses who had knowledge of his business testified to this effect. That was the business from which he obtained his livelihood, and to which he devoted his time and attention. His statement as to his occupation was therefore literally true.

The word "connected," in its popular sense—and in this sense it must be presumed to have been used here (section 2209, Civil Code), for there is no ground to think that it was used in any other sense—means joined to, connected or closely associated with, conveying the idea of more or less permanency. This idea is associated with the expressions "connected by blood," "connected in business," "connected by rail or water," and the like, involving the idea of something more than a casual or accidental association or union. In this sense we think it was intended to be used by the parties here. Otherwise the single accommodation extended to Nelson at the time the application was written—such as when the assured invited

Thompson and his solicitor to drink with him, and he himself served them—would have to be construed as such a connection with the particular business as to work a forfeiture of the policy, if not stated. Thompson evidently understood such connection as he observed between the assured and the business of Nelson not to be substantial or permanent in the sense in which the word “connected” is ordinarily used. Thompson’s understanding of the term, while not conclusive upon the company, is illustrative of the sense in which it was intended to be employed. If this be the correct interpretation of the term, then such incidental or occasional service of the assured in tending that bar was not such connection with the business as to make his negative statement in the application a misrepresentation. The evident purpose of requiring the declaration in the application was to inform the company exactly as to the business connections of the applicant, so that it, through its agents, could determine whether or not the risk was a suitable one. From this point of view—and we think it the proper one—the statement was true, and the contention of the defendant cannot be sustained.

Counsel cite many authorities in support of their contention—among them, the following: *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Graham v. Insurance Co.*, 87 N. Y. 69, 41 Am. Rep. 348; *Jeffrey v. United Order of the Golden Cross*, 97 Me. 176, 53 Atl. 1102; *Dimick v. Metropolitan Life Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692, 55 Atl. 291, 62 L. R. A. 774; *Aetna Life Ins. Co. v. France et al.*, 91 U. S. 510, 23 L. Ed. 401; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. These cases undoubtedly sustain the view that it makes no difference whether the particular representation is material to the risk or not, or whether the applicant acts in good faith. The question of materiality is settled and determined by the stipulations of the contract, and their truth or falsity made determinative of the rights of the parties. They do not, however, sustain the view contended for by the defendant.

The case of *Insurance Co. v. Rutherford* involved a warranty by the assured touching the cause of the death of his father. In the application the cause given was cholera morbus. In the proof of death the cause given was fistula. The court held that, it having been made to appear that the statement made in the application was false, the policy was avoided.

In *Graham v. Insurance Co.*, two policies of fire insurance were issued upon application of the agent of the plaintiff, who made false representations as to the ownership of the property insured. These representations were held to avoid the policy, since by the terms of the contract they were made material.

In *Jeffrey v. United Order of the Golden Cross*, the truth of the representations of the assured as to her previous condition of health was by the terms of the policy made a condition precedent to the liability of the company. She stated in the application, among other things, that she had suffered from dyspepsia, in light form, previous to the date of the application, but that her health was then good, whereas it appeared from the evidence that she had for twenty years been suffering from chronic dyspepsia and other ailments, which continued up to the date of the application. This representation, being false, was held sufficient to avoid the policy.

So the other cases cited all support the general rule that where, by the terms of the policy, the statements contained in the application are made a part of it, as conditions precedent, and the insurer assumes the risk only on the faith that they are true, the insurer does not become liable unless the representations are literally true. In each of the cases cited the representation was an unequivocal false statement in direct reply to the question propounded to the applicant.

Nor does it make any difference that the agent or solicitor knows that the representations are not true, since, under the terms of the contract, he has no authority to waive any requirement in this regard made by his principal. (*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.)

In this case we have seen that the applicant stated the truth about his occupation. So, also, he did as to his connection with the sale of intoxicating liquors, under a proper construction of the term "connected," as used in the application; for an occasional or gratuitous service by way of accommodation to another in his business may not be construed into an engagement in the pursuit of such business. Such a construction would be excessively technical, and not in accordance with the meaning of the term in its ordinary, popular sense.

2. The contention that the policy was forfeited by the failure of the assured to pay the premiums according to its terms must be sustained. The facts shown by the evidence are that, within a few days after the policy was remitted to Thompson, he went to the restaurant of the assured to deliver it and to collect the first premium. The assured told him that he did not have the money, and would not have it until the 20th or 21st of the month. He further said that he could not pay the premiums semi-annually, and desired Thompson to arrange for him with the company so that he could pay quarterly on the 20th or 21st of the month, his reason being that his customers were railroad men, and, as their pay-day came on the 20th and 21st, his collections were made at that time, and it would be more convenient for him. Thompson agreed to arrange for the quarterly payments. At the same time he told the assured that he could pay on the 20th, 21st or 22d, or, as some of the testimony tends to show, at any time before the 30th. Upon the delivery of the policy on the 21st, one-half of the semi-annual premium was accepted. On August 29th permission was granted by the company, in writing signed by its secretary, to pay the premiums quarterly, but the 6th days of August, November, February and May were fixed as the dates of payment, thus indicating either that Thompson did not report to the company the proposed change in date of payment, or that the company was not willing to grant this further departure from the terms of the policy as already written. Thereafter, according to the receipts of payment to Thompson

introduced in evidence, and his statements accompanying his remittances to the company, payments of premiums were made as follows: November 8, 1902; February 6, 1903; May 22, 1903. According to the testimony of Roberts, the solicitor, the payment of February 6, 1903, was actually made on the 22d of the month.

The insured became ill in May, 1903, and was taken to a hospital. The plaintiff, being a personal friend, went to the office of the agent, Thompson, on May 22d, and paid the premium due on the 6th to a clerk—Thompson being absent—and obtained the receipt. He did this at the request of the assured, but said nothing to the clerk in Thompson's office of the illness of the assured. On the 25th Thompson, having discovered the facts, and presumably at the instance of the company, tendered to the plaintiff, for the assured, the amount of the premium so paid. It was not accepted. There is no evidence in the record that the written consent of the defendant was obtained that the premiums might be paid at times other than those fixed in the written permission of the company to pay on the dates named therein.

It is conceded by the respondent that, under the terms of the written contract, the premiums should have been paid at the time specified, and that a failure in this respect would ordinarily avoid the policy. The contention is made, however, that the evidence shows that Thompson, the agent, permitted the payments of November, 1902, and February, 1903, to be made at later dates, and that this fact, coupled with the fact that he agreed that any and all payments might be made as late at least as the 22d of the designated months, showed a waiver of this condition, so that the company could not repudiate the payment made on May 22d, and thus avoid the policy. This contention involves the assumption that the acts and engagements of Thompson were within the apparent scope of his authority, and therefore binding upon the company, or that, if such be not the case, the knowledge of his acts was brought

home to the company, and a course of dealing thus permitted by the company which estopped it to deny its liability.

That the acts and engagements of Thompson were not within the apparent scope of his authority is clear. The eighth condition of the policy is an express limitation upon the authority of the agent. It declares that "the contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for this purpose will not be delegated; no other person has or will be given authority." It limits the authority of the agent to the taking of applications, the delivery of policies, the collection of premiums, and other matters of like nature, and to this limitation the assured gave his assent. He knew of it at the time he accepted the policy, or, what is the same thing, the conclusive presumption is that he knew. Such being the case, he knew that any engagement he entered into with Thompson was not binding on the company unless it was brought to its knowledge and ratified by it. It was his duty to read the policy and all the conditions and limitations it contained, and, if he did not do so, the omission was his own fault, and the loss, if any, must fall on him. He could not be permitted to enter deliberately into the contract, and then, after disregarding its plain conditions, be heard to say that the other contracting party was nevertheless bound. In such case the knowledge of the agent cannot be imputed to the principal so as to bind it, for the obvious reason that the particular act or declaration in controversy is known by the party dealing with him to be beyond the scope of his authority. The opposite view would render nugatory and destroy the very precaution taken by the principal to prevent the agent from departing from the strict terms of the contract without authority granted, as in the contract provided, and would result in a substitution of a different contract for the one made by the parties. The

following authorities fully support this view: *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Northern Assurance Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293; 1 Current Law Review, 50, and notes; *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518. See notes to *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 6 Am. Rep. 144, 15 Atl. 353, 1 L. R. A. 216, and *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222.

In *Northern Assur. Co. v. Grand View Bldg. Assn.*, *supra*, the United States supreme court, after an extensive review of the authorities, both state and federal, touching the authority of insurance agents, expressed its views as follows: "That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the company are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the

policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." These conclusions were stated after a consideration of the conditions contained in a fire insurance policy, but they apply with equal force to any species of contract.

The company not being presumed to have knowledge of the engagements and conduct of the agent, do the facts tend to show that it ratified them, or that after notice it pursued such a course toward the assured that it estopped itself? The first payment was made on the delivery of the policy. This was a condition precedent to the validity of the policy. The payment in November was made on the 8th, two days after it was due. It was so reported to the company. By retaining this premium the company is conclusively presumed to have ratified the act of the agent, and to have waived the forfeiture. The only knowledge the company had of the date of the next payment, so far as the evidence tends to show, was that it was made on February 6th, the agreed date. The last payment was made sixteen days after it was due, but was tendered back, and the act of the agent in receiving it repudiated. It seems significant that, though the third payment was in fact not made until it was overdue, the company was informed that it was made

when due. From this fact the inference might be drawn that this misrepresentation was made because the agent understood that the company would not waive another forfeiture. But be this as it may, it was a misrepresentation which prevented any ratification or waiver by the company. There was then but the single act of waiver by the company in November upon which the plaintiff bases his claim of estoppel. This is not sufficient to sustain it.

Nor is the fact, incidentally shown in the evidence, that the company waived forfeitures of policies held by other persons, of evidentiary value, it not being shown that the holder of this policy knew of such waivers, and that his conduct was influenced by such knowledge. Under the circumstances, fair dealing also required that the assured inform the company of his condition at the time the last payment was made. For it was entitled to know the facts, so that it might intelligently exercise its option, for, the forfeiture having already occurred, the concealment of the fact that the assured was probably already *in extremis* was fraudulent. (*Globe Mutual Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387.)

3. No complaint is made that the court erred in admitting or excluding evidence, except with reference to that showing that the assured received no compensation for his occasional service at Nelson's bar. Objection was made that this was immaterial. We think it was of some materiality, as tending to show the exact relation of the assured to the business.

Some criticism is made of the instructions submitted to the jury. It is not necessary to notice them, since what has already been said is sufficient to guide the court in further proceedings in the case.

The judgment and order are reversed, and the district court is directed to grant a new trial.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

(Submitted May 15, 1905. Decided May 29, 1905.)

Petition for Rehearing—When Proper to be Presented—When not.

A petition for rehearing should be presented only in those cases where reasonably good grounds therefor exist, and this should appear on the face of the petition. The court should not be asked to reconsider matters which have been considered and determined, especially where its view is conceded by counsel to be supported by authority.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Of the several grounds contained in the petition for a rehearing submitted herein only one requires notice. It is said by counsel that the conclusion reached is in direct conflict with the decision in *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211, and that this decision should be followed or distinctly overruled. This contention is based upon a misconception of what was decided in the case of *Wright v. Insurance Co.*, for it is clearly distinguishable from the case at bar. In that case a policy of a fire insurance had been effected by a general agent of the company after a personal examination of the risk. No written application was made by the assured, nor did the policy contain a stipulation limiting the powers of the agent. It did contain a stipulation that, "if the property be a stock of merchandise, and the same, or any part thereof, be or become mortgaged," the policy should be void, unless consent in writing by the company should be indorsed upon it. A portion of the risk consisted of a stock of merchandise upon which was a mortgage at the time the insurance was effected. Specific amounts were placed upon the separate classes of property insured. The defense made by the company was that the contract was avoided by the fact that the assured did not reveal the existence of the mortgage to the company and have its consent thereto indorsed upon the policy. This court, in reversing a judgment in favor of the defendant, laid down two propositions: First, that the policy

was not avoided as a whole by the fact that it covered a class of property falling within the prohibition, even though void as to such prohibited class; and, second, that, since the policy had been issued after personal examination by the agent, without any inquiry touching the existence of the mortgage, which was on the public records, and no representations had been made by the assured, who paid the premiums and accepted the policy without knowledge of the provisions therein touching the mortgage or mortgages already or thereafter to be effected upon the property, the company should be held to have consented to assume the risk, though encumbered by the mortgage, as effectually as if the provision had been complied with. It is not argued that the first proposition has any application to this case. The second is founded upon the principle that the agent acted generally for the company, and that having satisfied himself by personal inquiry and examination of the character and condition of the risk and recommended the issuance of the policy, his knowledge should be imputed to the company, and that the contract should be upheld, though consent to the mortgage was not formally indorsed upon it. The company issued the policy upon the knowledge acquired through its agent acting within the apparent scope of his authority, and, the circumstances being such that he knew, or should have known, of the existence of the mortgage, his knowledge should be imputed to the company. Had the policy been issued upon false representations made by the assured, or had the mortgage been subsequently put upon the property, then questions would have arisen analogous to those decided in the case at bar; and the analogy would have been more striking had the authority of the agent been expressly limited by the terms of the contract made by the parties. In this case the agent acted under limited authority, and the exact extent of his power touching the waiver of forfeitures was known to the assured and agreed to by him; and, while a forfeiture could have been waived in other ways than that provided for in the contract, yet we do not think the evidence is sufficient to show that such waiver was

made in this case. There is, then, no conflict between the conclusion reached here and the second proposition decided in *Wright v. Fire Insurance Co.*

Counsel, in his brief, in support of his petition for a rehearing, has seen fit to present again, and urge upon the attention of the court, the argument presented by him at the hearing touching the matter of forfeiture for failure to pay premiums. While conceding that the conclusion reached by the court is supported by abundant authority, he insists that such is the importance of the decision that the court should re-examine the whole question, and change the conclusion stated. If counsel had carefully studied the opinion of the court in connection with the decision in *Wright v. Insurance Co., supra*, he would not have ventured to trouble the court by presenting this question again. The rule allows parties to apply for a rehearing in proper cases, but a petition for a rehearing should be presented only in those cases where reasonably good grounds therefor exist, and this should be made to appear upon the face of the petition. If this court has committed error, or overlooked some matter of importance in deciding a case, as shown by the record and opinion itself, the petition should be confined to the presentation of these matters. The court should not be asked to reconsider matters which have been already considered and determined, especially where counsel concede that the view of the court is supported by authority. (*Big Blackfoot Milling Co. v. Blue Bird Min. Co.*, 19 Mont. 454, 48 Pac. 778.) The petition is denied.

Denied.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the conclusion and in the opinion except as to what is said in regard to the *Wright Case*. As to it I do not express any opinion.

ADLAM ET AL., RESPONDENTS, v. McKNIGHT, APPELLANT.

(No. 2,089.)

(Submitted March 23, 1905. Decided April 20, 1905.)

*Sales—Personal Property—Executory Agreement of Sale—Evidence.**Sales—Personal Property—Intention—Identification.*

1. Under Civil Code, section 1540, the actual passing of title, as between the parties to a contract of sale of personal property, is made dependent upon the intention of the parties and the identification of the thing sold.

Sales—Personal Property—Intention—Question of Fact.

2. The intention of the parties to a contract of sale of personal property is one of fact, to be determined by the jury under proper instructions of the court.

Sales—Personal Property—Executory Agreement—Evidence.

3. Evidence held insufficient, under Civil Code, section 1540, to show that an agreement to sell certain cattle amounted to an actual sale, so as to make the vendee, who prior to delivery promised to retain a part of the purchase price and pay it to a creditor of the vendor, indebted to such creditor on account thereof.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by W. J. Adlam and another, copartners as Adlam & Thompson, against J. W. McKnight. Judgment for plaintiffs. Defendant appeals from the judgment and an order denying his motion for a new trial. Reversed.

Mr. J. E. Erickson and Messrs. McConnell & McConnell, for Appellant.

Messrs. Downing & Roote, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced by Adlam & Thompson to recover from the defendant McKnight the sum of \$288.80. The complaint alleges that during the month of January, 1898, the plaintiffs sold and delivered to one Charles Simons goods,

wares, and merchandise of the value of \$343.10; that about the same time Simons sold and delivered to McKnight certain cattle for the sum of \$700 or thereabouts; that afterward Simons directed McKnight to withhold from the moneys due him by McKnight, and to pay to the plaintiffs, the said sum of \$343.10, being the amount of Simons' bill to these plaintiffs; and that McKnight did withhold said amount from the moneys due from him to Simons, and did promise to pay said sum to these plaintiffs, but neglected and refused to pay the same or any part thereof, except the sum of \$54.30, which, it is alleged, was paid on May 27, 1898. The answer denies all the material allegations of the complaint, and sets forth that the agreement pleaded in the complaint is a special promise to answer for the debt or default of another, and, not being in writing, is within the inhibition of the statute of frauds. The cause was tried to the court and a jury. Special interrogatories were submitted to and answered by the jury, which also returned a general verdict in favor of the plaintiffs for the amount claimed, upon which verdict a judgment was entered. From this judgment, and an order overruling his motion for a new trial, defendant appealed.

The court gave to the jury a general instruction outlining the issues disclosed by the pleadings as indicated above, and then proceeded: "The issues to be decided by you are: 1. Did Charles Simons direct defendant, McKnight, to pay Adlam & Thompson the amount alleged? 2. If Charles Simons directed defendant, McKnight, to pay Adlam & Thompson the said amount, did McKnight at that time have in his hands sufficient money belonging to Simons to pay the said debt? 3. If Simons directed defendant, McKnight, to pay Adlam & Thompson the amount stated, and the defendant, McKnight, had in his hands at that time sufficient funds belonging to Simons to pay the same, did he agree to pay plaintiffs the said amount, and fail to keep his agreement? If you decide each of the above issues in the affirmative, you will find for the plaintiffs for the amount found to be due. Unless you decide

each of the above issues in the affirmative, you will find for the defendant."

It thus becomes entirely immaterial what theory of this case the plaintiffs may have had, for the case submitted to and determined by the jury is made by the court in limiting the jury to a consideration of the three questions propounded above. Under the pleadings, as well as these instructions of the court, there was not any question of novation or of an original promise on the part of McKnight involved.

The evidence is conflicting as to the subject matter of the first and third questions, and, for the purpose of this appeal, it may be said to be sufficient to sustain the findings of the jury in reference thereto. So far as the answer to the second question above is concerned, it may be said that the only evidence touching this feature of the case is to be found in the testimony given by Simons, a witness for plaintiffs, and by the defendant, McKnight, in his own behalf; and since the court told the jury that they must answer the second question in the affirmative, as well as each of the other two, in order to find for the plaintiffs, the decision on this appeal turns upon the question: Does the evidence show that, at the time McKnight made the promise (if he made it), he had in his possession funds belonging to Simons sufficient to pay the bill of Simons to Adlam & Thompson?

On his cross-examination the witness Simons testified: "I sold thirty-two head of cattle to Mr. McKnight; I was to receive \$22 a head for them. I bargained to sell, I told him. He wanted to buy the brand, and I told him there must be about fifty-six head, and Hank Weimer went out and only gathered thirty-two head; that was all I sold him. I was in debt to Mr. McKnight at that time; I think I owed him \$71; I don't know for certain how much I owed him."

During his examination the defendant, McKnight, in his own behalf testified as follows: "I am acquainted with Charles Simons. I had some business transactions with him in the

early part of the year 1898; I think it was afterward, about four or five days, he came to me and wanted to sell me some cattle he claimed he had on the reservation, and said he had fifty-six head, and I asked him how much he wanted, and he said \$22 a head for them, and I said that I would buy them from him, and he gave me a bill of sale for fifty-six head of cattle to be delivered some time in the spring. * * * These cattle were delivered between the 25th of February and the 1st of March, I think. I gave him credit for what they came to on the 1st of March. There were thirty-two head of cattle delivered, and I was to pay him \$22 a head. On the 1st of March, when these cattle were delivered to me, Mr. Simons owed me \$609. He owed me that amount before the delivery of the cattle; after the cattle were delivered I was a little bit in his debt—\$73. He had \$73 to the good. This \$609 was an account I had against Simons, and part of it had been running for a couple of years; he had been trading at my store and got goods there, and that is what induced me to buy the cattle, and get even with him again. * * * I did not give Simons credit for the cattle until they were turned over; that was the understanding with Simons—that no money should be exchanged or value exchanged until the delivery, and they was accepted by me; that is the ordinary way of doing business.”

The evidence discloses that the agreement between Simons and McKnight for the sale of the cattle was made on or about January 2, 1898, and the agreement by McKnight to pay the amount of Simons' bill to Adlam & Thompson, if made at all, was made on or about January 11, 1898. In order for the jury to say, as it did, that on January 11th McKnight had in his hands sufficient funds belonging to Simons to pay the debt of Simons to Adlam & Thompson, it must have found that the agreement made on January 2d between Simons and McKnight amounted to an actual sale, wherein title to the property which was the subject of sale passed at once to McKnight, for it is only upon this theory that it could be said that Mc-

Knight had in his possession any money belonging to Simons, or was indebted to Simons in any amount whatever. But upon what testimony could the jury justify such a finding? The only evidence in reference to the sale is that given above.

Section 1540 of the Civil Code provides: "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." An analysis of this section shows that the actual passing of title, as between the parties to the contract, is made dependent upon, first, the intention of the parties; and, second, the identification of the thing sold. So far as the evidence above discloses any intention, if it does disclose any whatever, it is that the title was not to pass until delivery; and there is no evidence at all as to any identification of the property, unless the act of delivery was such identification, and this did not occur until about March 1st. The intention of the parties is one of fact, to be determined by the jury, and the court should by proper instructions have guided the jury in determining whether there was in fact a sale or merely an executory agreement of sale, as defined in section 2323 of the Civil Code. (24 Ency. of Law, 2d ed., 1048, and cases cited; 1 Benjamin on Sales, Corbin's ed., secs. 309, 311.)

No instructions upon this phase of the case were given, and from the meager proof it was impossible for the jury to say that, as between Simons and McKnight, they intended that the title should pass at once, and that there was in fact an identification of the property sold. How many cattle did McKnight in fact agree to purchase? Suppose that between the date of the agreement between McKnight and Simons and the date of delivery all the cattle had died, would McKnight have been indebted to Simons, and, if so, for what amount? If McKnight was indebted to Simons on the 11th of January, was it for fifty-six head of cattle, or for only thirty-two, the number which was actually afterward delivered, and was not the delivery the only identification ever intended by the parties?

These are questions which suggest themselves, and which cannot be answered from the evidence in this record.

There was not sufficient evidence before the jury to justify an affirmative answer to interrogatory No. 2 above; and, as the court instructed the jury that every one of the three questions submitted must be answered in the affirmative in order to support a verdict in favor of the plaintiffs, the verdict returned and the judgment based thereon are not supported by the evidence. We are of the opinion that the court adopted the correct theory of the case as disclosed by the pleadings, but there was not even sufficient evidence to go to the jury upon the subject embraced in the interrogatory No. 2 above, and for this reason the judgment and order are reversed, and the cause is remanded to the district court with directions to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

FINLEN, APPELLANT, v. HEINZE ET AL., RESPONDENTS.

(No. 2,063.)

(Submitted November 17, 1904. Decided April 20, 1905.)

Mines—Sale—Oral Option—Specific Performance—Law of the Case—Sufficiency of Evidence—Equity—Appeal—Review of Facts—Record—Trial on Counterclaim—Estoppel—Change of Venue—Transfer of Cause Between Departments—Continuance—Placing Witnesses Under the Rule—Amendment—Surprise—Impeaching Witness—Harmless Error—Mutuality—Exclusive Possession—Improvements—Tender—Pleading—Interest.

Former Appeal—Law of the Case.

1. The decision of the supreme court on questions directly involved and considered on a former appeal is the law of the case on a second appeal.

32	354
33	266

32	354
35	160
35	363
36	56
36	88
36	90
36	340

32	354
37	424
38	41

32	354
39	370
39	404

32	354
41	9
41	453
41	555

32	354
40	565

Mines—Oral Agreement for Sale—Evidence—Sufficiency—Specific Performance.

2. Evidence on a counterclaim for specific performance *held* sufficient to show a complete oral agreement for sale of interests in a mine.

Supreme Court—Equity Cases—Review—Questions of Fact—Evidence.

3. Under Code of Civil Procedure, section 21, as amended by Act of 1903 (2d Extra. Session of 1903, page 7), authorizing the supreme court to review all questions of fact, in an equity case, arising on the evidence presented in the record, and determine the same, the appellant must show that the preponderance of the evidence is against the findings of the trial court before the supreme court will disturb such findings on the ground of insufficiency of the evidence.

District Courts—Specific Performance—Evidence.

4. The district court, in an action to enforce specific performance of an oral agreement for the sale of real property, should weigh the evidence adduced in the light of the circumstances surrounding the transaction, and particularly with reference to the reasonableness or unreasonableness of the respective statements made by the principal actors in the case.

Statutes—Constitutionality—Equity Cases—Review.

5. Section 21, Code of Civil Procedure, as amended by Act of 1903 (2d Extra. Session, page 7), requiring the supreme court to review in equity cases all questions of fact arising upon the record and determine the same, does not purport to impose on that court any additional original jurisdiction, and hence is not unconstitutional.

Ejectment—Trial on Counterclaim—Specific Performance—Mines.

6. Where plaintiff sues in ejectment for a mine, but trial is had only on the counterclaim for specific performance of plaintiff's contract to convey the mine to defendant, the answer thereto, and the reply to such answer, the answer to the complaint in ejectment, denying plaintiff's right in the property, is not properly before the court, and so cannot affect defendant's right to specific performance.

Mines—Specific Performance—Estoppel.

7. Defendant is not estopped to claim that he succeeded to plaintiff's interests in a mine by contract with plaintiff, by reason of having brought suit in plaintiff's name, after the date of the contract, to enjoin a third person from working the mine, this having been under an arrangement with plaintiff, and he not having been misled thereby.

Change of Venue—Disqualification of Judges.

8. Under Code of Civil Procedure, section 615, subdivision 4 (before amendment by Act of 1903), authorizing change of venue "when from any cause the judge is disqualified from acting," the ground for change must be one of the causes enumerated in section 180 of the same code, as disqualifying a judge to sit in an action.

District Courts—Transfer of Cause from One Department to Another—Rules.

9. The transfer of a cause from one department to another of a district court is controlled by the rules adopted by such court.

District Courts—Transfer of Cause Between Departments—Irregularity.

10. A party may not complain of irregularity in the transfer of a cause from one department to another of a district court, in the absence of a showing that he was prejudiced by the transfer.

Continuance—Party not Ready for Trial.

11. Error cannot be predicated on the overruling of plaintiff's objection to immediately proceeding to trial on the ground that he was not ready for trial, where there was no application for continuance,

and no showing why plaintiff could not try the case then as well as at any time.

Witnesses—Exclusion from Courtroom—District Courts—Discretion.

12. Under Code of Civil Procedure, section 3371, providing that if either party requires it, the judge may exclude from the courtroom any witness of the adverse party not under examination, the application to exclude is addressed to the sound legal discretion of the trial court, subject to review only for a manifest abuse of such discretion.

Amendment—Surprise—Variance—Former Appeal.

13. Plaintiff cannot claim to have been surprised by the amendment of the counterclaim to conform to the proof, which defendant was permitted to make after conclusion of his direct testimony, where the same variance existed on a former trial and was called to the attention of the parties in the opinion on appeal from the decree then rendered.

Impeaching Witness—District Judges—Corrupt Decision.

14. Plaintiff, for the purpose of affecting the credibility of defendant's witness, may show that he was the active agent in procuring a person to negotiate with the judge on a former trial of the cause for a corrupt decision in favor of defendant.

Impeaching Witness—Evidence—Exclusion—Harmless Error.

15. Error in excluding evidence tending to impeach a witness for the defendant, seeking to enforce specific performance of an oral agreement for the sale of mining property, is harmless where, excluding this testimony, there is a clear preponderance of the evidence in favor of the findings for defendant.

Specific Performance—Clear and Unambiguous Proof—Complete Agreement.

16. Where there is made out by clear and unambiguous proof a complete agreement for sale of a mine, with all the terms that the parties saw fit to incorporate in it, specific performance may be decreed, though other terms might properly have been incorporated in a contract respecting such a subject.

Specific Performance—Mutuality—Performance.

17. The defense of want of mutuality is not available to defeat specific performance of an oral, optional contract where the party holding the option and seeking its enforcement has performed all its terms required to be performed by him.

Mines—Specific Performance—Exclusive Possession—Acts Inconsistent with.

18. The fact that plaintiff's foreman visited the mine in controversy several times during defendant's possession, and at one time directed the attention of defendant's foreman to the condition of the shaft, is not inconsistent with defendant's exclusive possession of the property under an oral option for its purchase from plaintiff, so as to bar his right to specific performance.

Specific Performance—Improvements.

19. Plaintiff may not defeat specific performance of an oral agreement for the sale of a mine which he gave defendant, on the ground that the latter, after taking possession, had made but slight expenditures in improvements, where defendant cleaned out the mine—which had been practically abandoned—repaired and replaced mining apparatus, and ran drifts and cross-cuts, discovering bodies of valuable ore in a few weeks where plaintiff had spent a considerable fortune in unsuccessful attempts to find ore bodies in paying quantities.

Specific Performance—Purchase Price—Tender—Pleading.

20. The counterclaim for specific performance of an oral agreement for the sale of a mine, possession of which plaintiff seeks to recover, need not allege a tender of the purchase price where it appears that plaintiff has denied the contract, and that acceptance of a tender would be refused; but it is enough to allege that defendant has at all times been able, willing and ready to comply with all conditions of the contract, and binds himself to pay the purchase money if he be given a decree for specific performance.

Specific Performance—Interest on Purchase Price.

21. Where plaintiff gave defendant an option to buy a mine, but, before the payments agreed upon became due, denied the existence of the contract and sued to recover the property, he was not entitled (section 4280, Civil Code) to interest on the purchase money, on specific performance being decreed against him, for the reason that he himself prevented defendant from making the payments.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Miles Finlen against F. Augustus Heinze and others. From an adverse decree on a counterclaim and from an order overruling his motion for a new trial, plaintiff appeals. Affirmed, Mr. Chief Justice Brantly dissenting.

Mr. A. J. Shores, Mr. W. W. Dixon, Mr. C. F. Kelley and Messrs. Forbis & Evans, for Appellant.

The facts are too indefinite to justify specific performance. In all cases of specific performance, the evidence must be clear, conclusive, and satisfactory. (22 Ency. of Pl. & Pr. 1075; *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891; *Cut-singer v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Purcell v. Miner*, 4 Wall. 513.) This rule is held to be applicable with especial force where, as here, the property is shown to be rising rapidly in value. (*De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816; see, also, *O'Connor v. Jackson*, 23 Wash. 224, 62 Pac. 761; *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290-294; *Brown v. Brown*, 33 N. J. Eq. 650; *Senomes v. Worthington*, 38 Md. 318; *Vanwert v. Chidester*, 31 Mich. 208; *Banks v. Weaver* (N. J.), 48 Atl. 515.)

The contract cannot be specifically enforced for want of mutuality. (See brief on former appeal, 28 Mont. 554.)

No part performance of the contract has been shown. (See brief on former appeal, 28 Mont. 554.)

The defendant, having disputed plaintiff's rights, cannot have specific performance of the contract. (*Willison v. Watkins*, 3 Pet. 43; *Bigelow on Estoppel*, 547; *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 229; *Conrad v. Lindley*, 2 Cal. 174; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 679; 27 Pac. 942, *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. 202.)

The defendant does not offer, in his bill to do equity, and the offer is an essential part of a bill for specific performance. (20 Ency. of Pl. & Pr. 458; 3 Pomeroy's Equity, 1408; *Wenham v. Switzer*, 59 Fed. 947.)

The court erred in transferring the cause to another department, and in not granting a change of venue. If Judge Harney was disqualified from sitting in the case, he was equally disqualified from selecting his successor. The law very wisely gives no judge the power to select the judge for a party, in a case where the judge is disqualified. (See *Krumdick v. Crump*, 98 Cal. 119, 32 Pac. 800; *Anaheim Water Co. v. Jumba etc. W. Co.*, 128 Cal. 568, 61 Pac. 80.)

Error was committed by the court in refusing to exclude the witnesses of defendant not under examination from the courtroom during the taking of the testimony. (1 Greenleaf on Evidence, secs. 431, 432, note 1; 2 Phillips on Evidence, 395; *Southey v. Nash*, 7 Car. & P. 632; *Walker v. Commonwealth*, 8 Bush (Ky.), 84; *Salisbury v. Commonwealth*, 79 Ky. 425; *Johnson v. Clem*, 82 Ky. 84; *Rainwater v. Elmore*, 1 Heisk. (Tenn.) 363; *Watts v. Holland*, 56 Tex. 54.)

It was competent for the purpose of showing the credibility of the witness, MacGinniss, to ask him any question in an attempt to show his interest in the suit, and his bias in favor of, or prejudice against, either of the parties to the suit, and the court erred in excluding such testimony. (*Sweet v. Shumway*, 102 Mass. 369; *Day v. Shekney*, 14 Allen, 255; *Beck v. Hood*, 39 Atl. 842; *State v. Downs*, 91 Mo. 19, 3 S. W. 221;

Bates v. Holladay, 31 Mo. App. 169; *The Queen's Case*, 2 Brod. & B. 312, 6 E. C. L. 160; *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *O'Connor v. National Ice Co.*, 56 N. Y. Sup. Ct. 410, 4 N. Y. Supp. 537; *Barkley v. Copeland*, 86 Cal. 487, 21 Pac. 1; *Williams v. Dickinson*, 28 Fla. 108, 9 South. 847; *Georgia R. R. etc. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 798; *Fuller v. Fuller*, 108 Ga. 256, 33 S. E. 865; *Alward v. Oaks*, 63 Minn. 190, 65 N. W. 270; *Missouri, K. & T. Ry. Co. v. Glamory*, 34 S. W. 361; *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884; *Luhrs v. Kelly*, 67 Cal. 292, 7 Pac. 698.)

Mr. John J. McHatton, and Mr. Chas. R. Leonard, for Respondents.

This court will not enter upon a re-examination or rehearing of questions of fact and of law once decided. (*Daniels v. Insurance Co.*, 2 Mont. 500; *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553; *Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669; *Davenport v. Kleinschmidt*, 8 Mont. 467, 20 Pac. 823; *Maddox v. Teague*, 18 Mont. 512, 46 Pac. 535; *Priest v. Eide*, 19 Mont. 53, 47 Pac. 206, 958; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439; *Mahoney v. Butte Hardware Co.*, 27 Mont. 463, 71 Pac. 674; *Clary v. Hoagland*, 6 Cal. 685; *Leese v. Clark*, 20 Cal. 417; *Lassnig v. Paige*, 56 Cal. 139; *Sharon v. Sharon*, 79 Cal. 686, 21 Pac. 26, 131; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Cowles v. Chicago etc. Ry. Co.* (Iowa), 88 N. W. 1072; *Chicago etc. R. Co. v. Yost*, 61 Neb. 530, 85 N. W. 561; *Teryll v. City of Fairbault*, 84 Minn. 341, 87 N. W. 917; *Armijo v. Mountain Elec. Co.* (N. Mex.), 67 Pac. 726; *City of Austin v. Bartholomew*, 107 Fed. 349; *Elliott's Appellate Procedure*, 578.)

Section 21 of the Code of Civil Procedure, as amended by section 1, Chapter I, Laws of Second Extraordinary Session of 1903, does not authorize a trial *de novo* in the supreme court. A true trial *de novo* must mean an opportunity to each of the parties to present all of the testimony which he desires and to have a ruling of the court thereon and a decision of the

entire case, as now the practice on appeal from justice courts to district courts. The Act in question does not even hint at any such purpose. The Constitution vests original jurisdiction in the district court. In the exercise of that jurisdiction, it tried the case. This court has no constitutional and, consequently, no original jurisdiction to try and determine the case. Its jurisdiction is appellate. The legislature could neither take from the district court its original jurisdiction nor confer it, or any part of it, on this court. It cannot increase the power or enlarge the scope of this court's authority or activity. The Constitution is the measure of its power. (*In re Weston*, 28 Mont. 207, 211, 72 Pac. 512.)

Neither can there be trial *de novo* here as defined by some courts on appeal in equity cases. This court being invested by the Constitution with appellate power only in a case of this kind, its review and determination of the case can extend no further, under the above or any Act of the legislative assembly, than the limits heretofore defined by the court in its decisions. When the Constitution was adopted, these decisions existed, as did the statutes and laws upon which they rest. It was in view of these laws and decisions that the appellate jurisdiction was conferred, and they mark its limitations. (*State v. Kennie*, 24 Mont. 45, 60 Pac. 589; *Finch v. Kent*, 24 Mont. 268, 279, 61 Pac. 653; *Montana Ore P. Co. v. B. & M. Co.*, 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005.) The appellate jurisdiction of this court is defined and the extent to which review may be had announced in the following cases: *Bordeaux v. Bordeaux*, 26 Mont. 533, 69 Pac. 103; *In re Weston*, 28 Mont. 207, 72 Pac. 512; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517; *State v. District Court*, 24 Mont. 539, 63 Pac. 395. (See, also, *Klein v. Valerius*, 81 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609; *Christensen v. Farmers' Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.) As sustaining the rule announced by this court in *State v. District Court*, 24 Mont. 539, as well as the other decisions of this court upon the same question, we cite the following cases, from

other courts: *Allen v. Kent Circuit Judge*, 37 Mich. 474; *Ferris v. Higley*, 20 Wall. 375; *Hubbell v. McCourt*, 44 Wis. 584; *State v. Jones*, 22 Ark. 331; *Miller v. Wheeler*, 33 Neb. 765, 51 N. W. 137; *Crull v. Keener*, 17 Ill. 246; *Kirkham v. Moore*, 30 Ind. App. 549, 65 N. E. 1042; *Baird v. Hutchinson*, 179 Ill. 435, 53 N. E. 567; *Canby v. Hartzell*, 167 Ill. 628, 48 N. E. 687; *Foster v. State*, 41 Mo. 61; *Harzfeld v. Converse*, 105 Ill. 534; *People v. Rumsey*, 64 Ill. 44; *Warren v. Dennison*, 89 Tex. 557, 36 S. W. 404; *Callanan v. Judd*, 23 Wis. 343.

The supreme court will not decide the case on the weight of the evidence, as the trial court may do, but will only reverse the decision of the trial court when there is a clear preponderance of evidence against the decision of the court below. (*Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4.) Where the evidence fairly justifies either one of two inferences, the finding of the lower court will not be disturbed. (*Spuhr v. Kolb*, 111 Wis. 119, 86 N. W. 562.)

In Nebraska, under a statute requiring the supreme court to review the evidence on appeal, it is said that "the correct rule appears to be that if the verdict or finding is clearly wrong, it should be set aside; but, if we only doubt its correctness, it will not be disturbed; and that where the testimony is taken orally before the trial court, his rulings must be given weight." (*Faulkner v. Sims* (Neb.), 94 N. W. 113; *Springer v. Chicago etc. Co.*, 102 Ill. App. 294; *Christensen v. Farmers' etc. Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730; *Kirkham v. Moore*, 30 Ind. App. 549, 65 N. E. 1042; *Hardware Co. v. Gardner* (S. D.), 99 N. W. 1105; *Chantler v. Hubbell*, 34 Wash. 211, 75 Pac. 802; *Chapman v. McIlwraith*, 77 Mo. 38, 43, 46 Am. Rep. 1; *Smith v. Allen*, 86 Mo. 178, 189; *Bogges v. Bogges*, 127 Mo. 305, 29 S. W. 1018; *Reed v. Reed*, 114 Mass. 372.) The appellate court cannot pass upon the credibility of witnesses, and, consequently, cannot, where there is a conflict in the testimony, arrive at its own conclusions therefrom, but must take the findings of the trial court. (*Shekey*

v. *Eldredge*, 71 Wis. 538, 37 N. W. 820; *Cox v. Cox*, 91 Mo. 71, 3 S. W. 585; *Hylar v. Nolan*, 45 Mich. 357, 7 N. W. 910; *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815; *Chantler v. Hubbell*, 34 Wash. 211, 75 Pac. 802; *Spuhr v. Kolb*, 111 Wis. 119, 86 N. W. 562; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113.) The practice prevailing in the federal courts is illustrated in *The Gladestry*, 128 Fed. 591; *Lopez v. Collier*, 129 Fed. 104; *Lilienthal v. McCormick*, 117 Fed. 58; *Denver etc. Ry. Co. v. Ristine*, 77 Fed. 58; *Heinze v. Butte & Boston etc. Co.*, 126 Fed. 1, 11; *Lansing v. Stanisics*, 94 Fed. 380; *Harding v. Hart*, 113 Fed. 304; *Big Creek etc. Co. v. American etc. Co.*, 127 Fed. 625; *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759; *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83.

The matter of whether or not witnesses shall be excluded is a matter of discretion with the trial court, and the exercise of that discretion cannot be reviewed in this court. (8 Ency. of Pl. & Pr. 93; *Chester v. Bower*, 55 Cal. 46; *Gregory Dry Goods Co. v. McMahon*, 61 Mo. App. 505; *Schneider v. Hass*, 14 Or. 177, 58 Am. Rep. 296.)

There was no error in sustaining the objection to the question asked witness MacGinniss if he knew Ada Brackett. It was within the discretion of the trial court to refuse such an examination. (*Storm v. United States*, 94 U. S. 76, 84, 85; *Third Great Western Turnpike Road Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311, and note; *Commonwealth v. Mason*, 105 Mass. 163; 29 Am. & Eng. Ency. of Law, 804, 806; Wharton's Evidence, 3d ed., sec. 541; Rapalje on Witnesses, sec. 197; Thompson on Trials, secs. 524, 525; *Commonwealth v. Churchill*, 11 Met. (Mass.) 538, 45 Am. Dec. 229; *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. 123, 9 L. R. A. 86; *Pullen v. Pullen*, 43 N. J. Eq. 136, 139, 6 Atl. 887.)

APPELLANT'S BRIEF IN REPLY.

The manifest purpose of the Act approved December 10, 1903, amending section 21 of the Code of Civil Procedure, re-

lating to the powers and duties of the supreme court, was, first (as conceded by counsel for respondent), to render unnecessary the specifications of particulars in which the evidence is alleged to be insufficient; and second, to require the court to determine all questions of fact arising in the evidence presented in the record, where upon the record it might appear to the court that there was no good cause for a new trial or the taking of further evidence in the court below. As to the second requirement, the Act does not impose a duty or confer or invoke a power not ordinarily and usually incident to the exercise of appellate jurisdiction in equity. If the Act is invalid in this respect, it can only be because the appellate jurisdiction of this court conferred by the Constitution is less extensive than the words "appellate jurisdiction" import in their generally accepted and historic meaning.

It seems to have been well settled as a rule of practice and procedure in the territorial supreme court, that in any case where there was a substantial conflict of evidence, whether at law or in equity, and whether tried by a jury or not, the verdict or findings below would not be disturbed. But this rule of practice was never in any opinion of the territorial supreme court referred to any lack of jurisdiction in that court to determine the facts upon the evidence, except in actions strictly at law which had been tried by a jury. Whether its appellate jurisdiction in chancery differed from its appellate jurisdiction at law with respect to a review of the evidence or a determination of the facts therefrom, is a question that apparently never received consideration, and, so far as we have been able to discover, was never even raised.

The scope of the appellate jurisdiction of the territorial supreme court, however, is set at rest by the decision of the United States supreme court in *Stringfellow v. Cain*, 99 U. S. 610, which cause was remanded to the supreme court of Utah with the following instruction, among others: "To review the case upon the evidence sent up from the district court in respect to the claims of Jennings and Young as against the

corporate authorities of Salt Lake City and decide according to the justice of the case."

The court should follow the statute, notwithstanding its previous practice. The practice of refusing to review the evidence or to determine the facts in an equitable case is a mere self-imposed restraint upon the exercise of the jurisdiction conferred upon this court by the Constitution, resting upon considerations of practical weight. There would seem to be no good reason for holding that the legislature may not, by express enactment, abrogate this rule of procedure affecting the exercise of appellate jurisdiction by this court, if the legislature may, by express statute, destroy the conditions and rules under which courts of equity have from time immemorial declined to exercise their inherent equitable jurisdiction. Indeed, a legislative change in the Practice Act, requiring all evidence in equity cases to be submitted in writing instead of being produced orally, would undoubtedly be a valid Act, and would furnish a sufficient basis and probably lead to a change of the rule under which this supreme court has heretofore acted in declining to review the evidence and determine the facts upon appeal in equity cases, because the reasoning and the basis of such rule would be gone. (See *Christiensen v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730; *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112; Elliott on Appellate Procedure, sec. 16; Curtis on Jurisdiction, p. 61; *Ex parte Ellis*, 12 Ark. 101; Ency. of Pl. & Pr. 402; *Sherwood v. Sherwood*, 44 Iowa, 192; *Preston v. Daniels*, 2 Greene (Iowa), 537; *Snyder v. Wright*, 13 Wis. 771; *Sanford v. McCreedy*, 28 Wis. 101; *Swift et al. v. Agnes et al.*, 33 Wis. 228; *Paige v. McMillan*, 41 Wis. 342; *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225; *Nessley v. Ladd*, 29 Or. 354, 45 Pac. 904.)

We think our Act of 1903 is valid; and we think it the duty of this court to examine the evidence contained in the record and find the fact in accordance with its own view as to the weight of evidence, resorting to the findings below in aid of

conclusions to be reached only where the evidence is in apparent equilibrium and this court unable to determine where the preponderance lies. In such a case as the one now before the court, where the rule of decision requires that the evidence shall more than preponderate in favor of the plaintiff's claim, and that it shall be clear, unambiguous and convincing, the facts should be found by this court against the plaintiff if the record does no more than to present a mere preponderance in his favor.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon the former appeal in this case (*Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123) a sufficiently explicit statement of facts was made, to which reference is now had, and a repetition of the whole avoided. It will be sufficient in this instance to say that in 1898 plaintiff, Finlen, held certain leases and bonds upon the interests of John Devlin, Mrs. Devlin, Mrs. Reilly, and Mrs. Kelly in the Minnie Healy lode mining claim, and had options to purchase those interests at any time on or before February 3, 1900, upon the payment of \$100,000; that in December, 1898, F. Augustus Heinze, hereafter referred to as defendant Heinze, entered into possession of the property, claiming that by oral agreement made on November 21, 1898, Finlen had transferred his leases, bonds, and options to defendant Heinze, and had agreed to execute a writing evidencing such transfer. In February, 1899, Finlen made an unsuccessful effort to recover possession of the property, and in June following commenced this action in ejectment. To the complaint filed, defendant Heinze interposed an answer, and, by way of an equitable counterclaim, pleaded the agreement of November 21st, alleged a breach by Finlen, and asked that specific performance be decreed. To this counterclaim Finlen filed an answer, and to this answer defendant Heinze replied; and upon such counterclaim, answer, and reply the equitable portion of this action was tried, a decision rendered, and de-

decree entered in favor of defendant Heinze, but on appeal to this court that decree was set aside and a new trial ordered.

On July 29, 1903, the *remittitur* from this court was filed in the district court, and on August 10th counsel for the defendant Heinze moved the court to advance the cause and set it for trial. This motion was granted, and the cause set for September 16th. Plaintiff objected to the cause being set for trial, and moved the court to change the venue, on the ground that Judge Harney, who had presided at the former trial, was disqualified from again trying the same. On September 12th this motion was denied, and the cause was thereupon transferred to department No. 2 of the same court, presided over by Judge Clancy. On September 16th Judge Clancy proceeded to trial, whereupon plaintiff objected to its trial in department No. 2 on the ground of lack of jurisdiction, and objected to the hearing at that time for the reason that plaintiff was not ready for trial. These objections were overruled, and the trial proceeded upon the counterclaim of the defendant Heinze, the answer of plaintiff, Finlen, thereto, and the reply of Heinze to this answer, the defendant Heinze assuming the affirmative of the issue. After the direct testimony in behalf of defendant Heinze was concluded, he was permitted, over the objection of plaintiff, to amend his counterclaim. The court found the issues in favor of defendant Heinze, and entered a decree in his favor, from which decree, and an order overruling plaintiff's motion for a new trial, these appeals are prosecuted.

Some of the errors specified by the appellant were directly involved upon the former appeal, and were there considered and determined. The decision of this court in that instance became the law of this case as to all such questions. (*Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439, and cases cited; *Mahoney v. Butte Hardware Co.*, 27 Mont. 463, 71 Pac. 674.)

1. It is contended that "the facts do not sustain the findings." We assume that what is meant by this is, that the evidence is insufficient to sustain the findings of the court.

It is claimed on the part of the defendant Heinze that prior to November 21, 1898, plaintiff, Finlen, had been negotiating for the sale of his interests in the Minnie Healy mining claim, represented by leases and bonds upon and options to purchase the interests owned by John Devlin, Mrs. Devlin, Mrs. Reilly, and Mrs. Kelly; that Finlen had expended at least \$54,000 in a fruitless endeavor to make a mine of the property; that he had taken out the tracks, air pipes, and other mining appliances, and had suffered waste and debris to accumulate in the different levels; that there was no ore of any commercial value in sight; that for a year or more prior thereto the only mining done by Finlen in this claim was development work to ascertain whether or not the Boston and Montana Company was trespassing upon and taking ores from a vein which Finlen had been informed apexed in the Minnie Healy claim; that up to this time the ore taken from this entire claim never paid expenses; and that Finlen was anxious to dispose of his interest in the claim. These are facts with reference to which there is not any material conflict in the evidence.

On the part of defendant Heinze it is further claimed that prior to November 21st Finlen and John MacGinniss, Heinze's agent, had been negotiating for an assignment by Finlen to Heinze of Finlen's leases and bonds or options on the property, and that these negotiations had progressed so far that MacGinniss had given to Heinze's counsel, McHatton, memoranda of an agreement for the assignment of Finlen's leases and bonds on the property, and that McHatton had drawn up two writings embodying a contract conformable to MacGinniss' ideas of the agreement he had made with Finlen; that on the afternoon of November 21, 1898, Finlen went to McHatton's office, where these writings were presented to him; that Finlen objected to and refused to sign them; that at McHatton's suggestion they went to see MacGinniss at his office with the Montana Ore Purchasing Company; that there they met MacGinniss, the defendant Heinze, and his brother Arthur P. Heinze, and for some time discussed the proposed transfer;

that at that meeting Finlen and defendant Heinze came to an agreement by which Finlen assigned his leases and bonds to Heinze by oral agreement that Heinze should, as soon as he elected, go into actual possession of the claim, work the same, keep the leases and bonds alive, and, if the property developed so as to justify Heinze, in his estimation, in taking up the leases and bonds from the Devlins, Reilly, and Kelly, he should thereupon pay plaintiff \$54,000 in two equal installments (\$27,000 one year after he should take up the leases and bonds, and \$27,000 two years thereafter), these payments to be made without interest; that, as a part of this contract, Finlen agreed to commence an action against the Boston and Montana Company, and seek an injunction to prevent that company from taking ore from the vein claimed to apex in the Minnie Healy ground, and from which it was claimed the Boston and Montana Company was taking ore through workings in the Piccolo and Gambetta claims; that this action was to be brought and prosecuted at Heinze's expense, and the proceeds, if any, realized, should belong to Heinze; that, pending the commencement of this action, Finlen should retain possession of the Minnie Healy claim; that McHatton should act as Finlen's counsel, and commence the action as soon thereafter as the papers could be prepared; that Heinze insisted that this agreement should be reduced to writing and signed by Finlen and himself at once; that, owing to Finlen's desire to leave Butte for the East on the evening of this conversation, he (Finlen) declined to wait for the writing to be prepared, and stated, in effect: "You take hold of the property at any time you want to. It is yours now. I have transferred all my right and title to it. * * * We understand each other thoroughly. There is nothing here which we have not agreed upon, and you can absolutely depend upon my signing the papers which Judge McHatton will get out. My word is as good as my bond, and I shall be back here before the 1st of January, and I will sign the papers as soon as I get back. In the meantime you can take possession of the property at any time you want to. I

have transferred my entire interest in it to you, and you can go ahead and do what work you want to." And to Judge McHatton he said: "Well, Judge, you go ahead and bring this suit, and draw up an agreement which will outline the different terms and conditions of our understanding, and as soon as I get back from the East I will sign the agreement." That, relying on this agreement, and the representation of Finlen that he would, on his return to Butte, execute a writing which would evidence the assignment of his leases and bonds, Heinze went into possession of the property on December 23d, and thereafter had exclusive possession of the same, and by the expenditure of large sums of money so far developed the property as to disclose large bodies of valuable ore, thereby greatly increasing the value of the property to such an extent as to justify Heinze in taking up the leases and bonds; that Finlen knew of this work, and at least tacitly approved it; that, soon after the disclosure of these valuable ore bodies, Finlen repudiated the agreement, and notified Heinze's attorney and agent that he (Finlen) would not sign the written assignments, and that he declared the deal off. The terms of this agreement are testified to by defendant Heinze, Arthur P. Heinze, John MacGinniss, and Judge McHatton, the four persons who were present with Finlen when the agreement is alleged to have been made, and the other facts detailed above are sworn to positively by one or more of these witnesses.

Finlen positively denies that any complete agreement was entered into, and states that the principal subject of the conversation on November 21st was the suit against the Boston and Montana Company, and that he (Finlen) gave Heinze permission to go into the possession of the property for the purpose of doing development work with reference to the subject matter of this suit. The facts remain, however, that Finlen admits that he went to McHatton's office on the afternoon of November 21st; (he says he went there to see about the suit, but admits that while there nothing whatever was said about the suit, but that McHatton presented to him drafts of an

agreement for an option upon his interest in the Minnie Healy claim. When asked why he did not then retire, his answer is, "Because I was a sucker"); that upon his refusal to sign these drafts, and at McHatton's suggestion, he voluntarily went with McHatton to MacGinniss' office; that he there met MacGinniss and the two Heinzes, and talked with them and McHatton over the facts relative to the commencement of the suit against the Boston and Montana Company, as well as the transfer of his options to Heinze; that the sum of \$54,000 was mentioned as the amount he should receive in case Heinze took up the leases and bonds, the payment of which was to be made in two installments, of \$27,000 each, one and two years, respectively, after Heinze should take up the leases and bonds; that McHatton should draw up a written contract, and on his return from the East he was to sign it, if satisfied. When asked what McHatton was to incorporate in this writing, Finlen says, "I don't know." He admits also that he agreed that a suit for Heinze's benefit should be brought in his (Finlen's) name against the Boston and Montana Company to restrain that company from extracting ore from the vein supposed to apex within the Minnie Healy ground; that Heinze's leading counsel, McHatton, should act as attorney for him (Finlen) in this suit, and that Finlen's confidential man and agent, Wishon, should verify the complaint; and that in this conversation he did make use of the expression, "My word is as good as my bond."

While it is conceded that McHatton was to draw up a written contract for Finlen's signature, it appears that he neglected to do so, and upon the cross-examination of Finlen this testimony appears: "Q. In this conversation on the 21st of November, 1898, you said your word was as good as your bond? A. And I say it right now. If you had carried out your contract, I would have carried mine out." This answer appears to have been directed to Judge McHatton, who was conducting the cross-examination, who then asked Finlen this question: "Q. What was my contract that I failed to carry out? A. Your contract was to have the agreement drawn out by the time I

got back from the East, and I was to sign it and turn the property over; and, if you had done it, I don't suppose there would be any lawsuit to-day." In view of this admission, it seems impossible that no contract whatever was entered into on November 21st. It is, however, perfectly apparent that no contract was entered into at that time, if we accept Finlen's idea of a contract as a correct one. Upon his cross-examination he says: "I did not think I could go in and talk to a half dozen people, and they take my rights away by my talking to them, unless they had something to show for it, or I received something for it or some showing. Q. Didn't you understand that the terms of an agreement could be arrived at without a writing? A. No, sir; I didn't, where you take a man's property away from him." From this it is apparent that Finlen confuses a contract with the writing which evidences such contract.

The district court had a right, and it was its duty, to weigh the evidence in the light of the surrounding circumstances, and particularly with reference to the reasonableness or unreasonableness of the respective stories told by the principal actors in the case. Finlen's version is that the only agreement actually entered into on November 21st was that a suit should be commenced by Finlen, in Finlen's name, against the Boston and Montana Company, for the use and benefit of Heinze; that the proceeds, if any, from the suit, should go to Heinze; that the purpose of the suit was to make it appear that Finlen was in litigation with the Boston and Montana people, and to that extent, at least, occupying a friendly position toward Heinze, who was involved in considerable litigation with that company; that he gave Heinze permission to go into the Minnie Healy claim and do an amount of development work unlimited, so far as this record shows, or at least left entirely to the caprice of Heinze, and yet all to be done at Finlen's expense. The result is that Finlen lent his name, his property and resources, and his influence in the community to Heinze, who, according to that version, had no interest whatever in the Minnie Healy property, merely for the purpose of enabling Heinze to harass

the Boston and Montana Company with litigation in which Finlen could in no manner be profited; but, in the work done by Heinze in his attempt by development to demonstrate that the suit could be successfully maintained, Finlen might be financially ruined, and likely to be, if Heinze's mining operations in the property proved as barren of results as Finlen's had theretofore been. This version is hardly consonant with good business sagacity or a high sense of self-respect.

Furthermore, Finlen's contention that the expense incurred by these men employed by Heinze in the Minnie Healy mine after December 23d was properly charged to him (Finlen) seems inconsistent with Wishon's statement that Finlen told him afterward to make out a bill to Heinze for this expense, and collect the same. Heinze's version is that the agreement of November 21st for the sale of Finlen's interests to Heinze was completed, and that under that agreement he put his men to work, and the expense incurred was to be his expense. As many other men do who take leases upon mining ground, he was expending his money with a chance of losing it, or of discovering ore of sufficient value to make the investment a profitable one.

As tending to corroborate the testimony of Heinze, his brother, MacGinniss, and McHatton, it is conceded that an action was commenced in the name of Miles Finlen (this appellant) against the Boston and Montana Company with reference to this particular vein heretofore alluded to; that such action was commenced on December 5, 1898; that Wishon verified the complaint; and that McHatton acted as counsel for the plaintiff in that action. It is further a conceded fact that on December 23d Heinze's employees went to work in the Minnie Healy claim, McFarlane acting as superintendent, and Mahoney as foreman; that all the men employed therein or discharged therefrom were employed or discharged by Mahoney; and that this character of work continued until about February 24, 1899, when Finlen attempted to gain control of the property, and for that matter until this action was commenced in

June, 1899, when an injunction was issued which stopped operations.

John Devlin, one of the owners of the Minnie Healy claim, who had given Finlen an option on his interest (an option which it is claimed by Heinze was assigned to him by the oral agreement of November 21st), testified that in November, 1898, before Finlen went East, he (Finlen) told Devlin that he did not intend to do any more work on the Minnie Healy, and that he intended to turn the property over to Heinze.

John Telling, a miner, who had had some dealings with Finlen with reference to this mining claim, by which Finlen had become indebted to him, testified that he saw Finlen with reference to his matter in December, 1898, upon Finlen's return from the East, and in a conversation he asked Finlen, "How is the Minnie Healy looking?" that Finlen replied, "I don't know how it is looking. I have turned it over to another party"; that Telling asked, "Who is the party that you turned it over to?" and Finlen replied, "Mr. Heinze and company"; that Telling asked, "What about our agreement?" and Finlen replied, "Well, if I make my money out of it, what I have invested in it—that is, \$54,000—I will pay you according to our agreement."

John Hoy testified that between November 15 and 22, 1898, Finlen told him that he had turned the Minnie Healy over to Heinze, and in the following January, in Helena, repeated the same declaration.

Hugh I. Wilson, who in 1898 was a tenant of Finlen, testified that in the fall of 1898 Finlen told him that he did not think that he would ever make a mine out of the Minnie Healy claim, and in November of that year told Wilson that he had disposed of the property to Heinze.

Heinze's employees McFarlane and Mahoney were given possession of the mine by Cook, who was Finlen's watchman at the mine; and Cook testified that Finlen told him in the fall of 1898 that, if Heinze came to look at the Minnie Healy

claim, for Cook to show him through, and, if he came to take charge of it, to turn it over to him; and Cook testified that, acting under this instruction, he did turn the property over to Heinze's employees on December 23d.

Wishon, who was Finlen's agent and foreman at another mine, testified that in November, 1898, Finlen told him he thought Heinze would take hold of the Minnie Healy, and for Wishon to give him possession if he came for it; that, acting under this instruction, he (Wishon) instructed Cook accordingly.

A witness (O'Neill) testified that he was working for Finlen in the Minnie Healy claim in the fall of 1898; that at the time the shaft was in bad condition, and he spoke to Finlen with reference to repairing it; that Finlen said to him: "Get along the best way you can. I expect to transfer the property at any minute to Mr. Heinze."

It is contended by appellant that certain circumstances tend to support Finlen's version, and to contradict Heinze and his witnesses. For instance, some of the men employed and bills for some of the materials used in this mine from December 23d to February 15th were paid by Finlen; that the first ore shipment made after December 23d was smelted at the Montana Ore Purchasing Company's smelter, of which Heinze was general manager; that an ore statement of the same was made out to Finlen, and a check for the net value of such shipment, amounting to \$294, was executed and delivered by the smelter company to Finlen, though it was never presented for payment or paid; that some of the men employed at the mine from and after December 23d were men who had formerly worked for Finlen in this same mine; and that finally Heinze's witnesses have, on different hearings of this cause, testified to contradictory statements of fact.

The explanations tendered for these matters are: MacGinniss, who was Heinze's agent, and acting for him, testified that, some time after Heinze commenced work on December 23d,

one of the men who had ceased to work there presented his time check to the Hennessy Mercantile Company for payment; that Wishon, Finlen's agent, came to see MacGinniss about it, and it was then agreed between these two agents that the men and bills for supplies should be paid by Finlen through the Hennessy Mercantile Company, through which medium Finlen had formerly paid his employees, and that Finlen should bill on Heinze for these amounts; that this was done for convenience. Wishon also testified to the same thing, and these facts are not disputed.

Wishon also testified that he reported this agreement to Finlen upon his return from the East, and that Finlen approved it, and at one time thereafter directed Wishon to make out a bill on Heinze for the amount then due, and get the money; that he (Wishon) did commence to make out such bill, but through his own negligence it was not completed at the time this controversy arose. The clerk or bookkeeper at the Montana Ore Purchasing Company smelter testified that he made out the ore statement to Finlen, presumably under the instruction of some one there—possibly MacGinniss—but he is unable to remember definitely.

MacGinniss, who made out the check to Finlen for this ore shipment, testified that he knew that, under the arrangement which he had with Wishon, Heinze was then indebted to Finlen for more than the amount of the ore shipment on account of payments made to men and for supplies, and that he sent Finlen this check as a part payment on that account.

With reference to the re-employment of the men who had formerly been employed by Finlen at the Minnie Healy mine, Heinze, MacGinniss and McHatton testified that, in the conversation of November 21st, Finlen asked Heinze to employ Cook, who was then employed by Finlen as watchman at the Minnie Healy, and that Heinze agreed to do so. It appears that, at the suggestion of McFarlane, Cook was employed by Mahoney as a shift boss.

Mahoney testified that, as soon as it was known that the Minnie Healy was being operated again, men, some of whom had formerly worked there, applied for work, and were given employment. So far as this record discloses, only a very few of these men so employed had ever worked for Finlen.

Particular stress is laid upon the fact that, at the former trial of this cause, defendant Heinze testified respecting the agreement of November 21, 1898, that the payment to Finlen of \$54,000 was to be made in two equal installments—\$27,000 one year after the expiration of the leases and bonds, (which was February 3, 1900), and \$27,000 two years after the expiration of the leases and bonds. In his counterclaim he alleges that these payments were to be made one and two years, respectively, after he should have taken up the bonds from the Devlins, Reilly and Kelly, and received deeds for the property, and upon this trial he testified according to the allegations of the counterclaim. In explanation of this apparent contradiction, defendant Heinze testified that he told Finlen that, if he should take up the leases and bonds, he would, in all probability, not do so until the date of their expiration, as that was his custom respecting such matters, and so thoroughly was he imbued with this idea that upon the former trial of this cause he made use of the terms "due date of the bonds" and "date of his taking them up" interchangeably, and as meaning precisely the same thing.

Other instances of like apparent contradictions are called to our attention, and it is incumbent upon us to say what, if any, importance we shall attach to the fact that the district court, which had the witnesses present in court before it, observed their demeanor while testifying, and could determine from their manner their apparent fairness or lack of fairness, after consideration of all the evidence found the issues in favor of defendant Heinze.

In *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, decided March 13th, this court gave attention to section 21 of the Code

of Civil Procedure, as amended by an Act of the Second Extraordinary Session of the Eighth Legislative Assembly, approved December 10, 1903, and among other things said: "This court has power, and it is its duty, so far as it may, exercising a due regard for the findings of the district court, based, as they are, upon the testimony of witnesses delivered *ore tenus* in the presence of the court, to reach its own conclusions, and to declare upon the rights involved accordingly. Owing to the advantageous position of the trial court, due to the conditions just adverted to, this court will naturally hesitate to overturn findings based upon substantially conflicting evidence which would justify an inference in favor of either side of the controversy." This conclusion was reached after many cases involving statutes or constitutional provisions similar to our section 21 as amended were examined. The case of *Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4, was cited with approval, and the following language from the opinion in that case was quoted and adopted: "This court will not decide the case upon the weight of evidence, as a trial court may do, but will only reverse the decision of the trial court where there is a clear preponderance of evidence against the decision of the court below. The presumption is in favor of the decision of the trial court upon the weight of evidence, which this court will respect, and therefore it is only when this court finds there is a clear preponderance of evidence against such a decision that the presumption above stated will be overcome. It becomes our duty, therefore, not only to determine if there is a substantial conflict in the evidence, but to determine the case upon the weight of evidence, having the above qualification in view."

In *Hardware Co. v. Gardner* (S. D.), 99 N. W. 1105, the doctrine announced in the *Randall Case* above, is reaffirmed, and it is there said: "The findings of the trial court are presumptively correct, and it is only when this court is satisfied that there is a clear preponderance of the evidence against such findings that such presumption will be overcome, and the decision of the trial court reversed. (*Randall v. Burk Township*, 4 S.

D. 337, 57 N. W. 4.) Notwithstanding there is a conflict in the evidence in this case, we are not satisfied that the same preponderates against the findings, or that the conclusions of law are not fully supported by the findings."

In Wisconsin, under a statute similar to our own, substantially the same rule is adopted as that announced in the South Dakota cases. In *Spuhr v. Kolb*, 111 Wis. 119, 86 N. W. 562, it is said: "A careful examination of the evidence shows that, if the witnesses are believed, their testimony overwhelmingly sustains the findings of the court. There are suspicious circumstances and contradictions in the evidence, which might justify a trial court in discrediting those witnesses, but the situation so arising is one upon which the trial court has peculiar advantages for reaching a correct conclusion. The manner and appearance of the witnesses in the explanation of such discrepancies is of very great value. The case therefore especially invites the application of the rule that, upon evidence fairly justifying either of two inferences, the decision of the trial court must control."

In Washington the same result is reached. In *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225, it is said: "In determining the facts established by the proofs the findings of the trial court should receive consideration, but cannot be allowed to control when, in the opinion of this court, they are contradicted by a clear preponderance of the evidence." (See, also, *Chantler v. Hubbell*, 34 Wash. 211, 75 Pac. 802.)

In Utah, under a constitutional provision similar to our Code, section 21, above, as amended, a rule similar to that prevailing in South Dakota has been adopted. In *McKay v. Farr*, 15 Utah, 261, 49 Pac. 649, it is said: "While we have power, under the Constitution, to review questions of fact in an equity case, still, when such cases have been regularly tried before a court of chancery, and facts found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate some oversight or mistake which

materially affects the substantial rights of the appellant. This is the settled rule in this state."

In *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980, the same court held that, under the constitutional provision above referred to, the supreme court has power in equity cases to go behind the findings and decree of the trial court, consider all the evidence, and decide on which side the preponderance thereof is. In *Elliot v. Whitmore*, 23 Utah, 342, 90 Am. St. Rep. 700, 65 Pac. 70, the decisions in the two former cases are reaffirmed.

The same rule seems to prevail in the federal courts. In *Lopez v. Collier*, 129 Fed. 104, 63 C. C. A. 606, it is said: "The case presents simple questions of fact. The evidence is conflicting. Several witnesses testified for libellant, and proved up his case. They were contradicted by several witnesses produced by defendant to prove up his case. The testimony was all taken in presence of the trial judge, who thus had an opportunity to see the witnesses and observe their demeanor while testifying; and, on the evidence, we are not able to say that he reached an erroneous conclusion."

In *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552, the same rule is announced as follows: "The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

To the same effect is the decision in *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144, where it is said: "There was a considerable amount of this evidence, and it was to some extent conflicting. The master acted in view of this

evidence, and the court below concurred in his finding, except in some unimportant particulars. As no obvious error or mistake has been pointed out to us, their conclusion must be permitted to stand."

It is true that a different rule is promulgated by some of the courts. For instance, in Oregon it is said that the decision of the lower court will only be consulted for the purpose of resolving a doubt which may arise from the conflicting and contradictory nature of the evidence. (*Nessley v. Ladd*, 29 Ore. 354, 45 Pac. 904, and cases cited.) But we prefer to adopt the other view, and hold that it is incumbent upon the appellant to show that the preponderance of the evidence is against the findings of the trial court, before we will disturb such findings upon the ground of insufficiency of the evidence.

Some contention was made upon the hearing that section 21, as amended, is unconstitutional. But we are not impressed with the argument offered. In fact, under the construction which we have given to the statute above, the objections to the validity of the Act are largely obviated. The Act does not purport to impose upon this court any additional original jurisdiction. It does not require us to try the cause *de novo* in this court, in the sense in which a trial anew is generally used, or in which it is used in section 1761 of the Code of Civil Procedure, when applied to appeals from justice courts to the district courts. No new pleadings can be filed in this court; neither can any new evidence be received. The Act only requires us to *review* the facts as presented in the record, and under like statutory provisions it is quite generally held that the appellate court can either render a judgment itself, or direct what proper judgment shall be entered in the trial court.

Considering this rule of construction announced above, and the fact that the trial court had the witnesses in this case before it, and further considering that the testimony of Finlen given on cross-examination is equivocal and evasive in many instances, and that he stands squarely contradicted by a large

number of witnesses, we prefer to adopt the language of the supreme court of South Dakota, above, and say: "Notwithstanding there is a conflict in the evidence in this case, we are not satisfied that the same preponderates against the findings."

Some contention is made that, while the evidence shows that at the conversation on November 21st reference was made to the payment of supplies then in the mine, and of men then engaged as watchmen about it, the finding of the court is that this was not a part of the agreement with reference to which specific performance is now sought, but a separate and independent transaction. An examination of the record discloses that this finding of the court is made upon testimony given directly to that effect—testimony not denied, except in so far as Finlen's general denial of any agreement having been made may be considered a denial. Under the rule just announced, this contention is not well made.

2. It is said that defendant Heinze, having disputed plaintiff's right in the property, cannot have specific performance of the contract. But counsel for plaintiff are mistaken in the facts. There is no such denial in any of the pleadings upon which this cause was tried. It appears that such denial is embraced in Heinze's answer to the plaintiff's complaint in the ejectment action, but that answer is not properly before us on this appeal. As we have heretofore said, the only pleadings properly before the court below and before this court are Heinze's counterclaim, Finlen's amended answer thereto, and Heinze's reply to this answer.

3. It is contended that by commencing an action in Finlen's name against the Boston and Montana Company, or suffering it to be done, Heinze thereby estopped himself to claim that he succeeded to Finlen's interests on November 21st. If an estoppel at all, it would be an estoppel *in pais*, with reference to which it is said in 11 American and English Encyclopedia of Law, second edition, 421: "The most usual application of the doctrine of estoppel *in pais* arises from the misrepresentation

or concealment of material facts on the part of the person to be estopped. Thus, it is a well-settled rule of equity, which has been adopted by the courts of law, that where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induced B to believe certain facts to exist, and B has rightfully acted on this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof." While the fact of the commencement of this suit in Finlen's name might be invoked as a circumstance tending to disprove Heinze's contention, it is apparent, when tested by the rule announced above, that it falls far short of working an estoppel.

4. Error is assigned to the refusal of the district court to change the venue, and to its transferring the cause for trial to Department No. 2, presided over by Judge Clancy. It is not easy to determine from the motion for change of venue just what the particular grounds thereof are. Objection is made to Judge Harney making any order in the cause or trying the same "for the reason that said judge is disqualified from acting in said cause, for the reason and on the grounds contained and set forth in the opinion of the supreme court of the state of Montana rendered in said cause. * * * The plaintiff therefore moves that this cause be transferred to the proper county," etc. This motion was made at a time prior to the Second Extraordinary Session of the Eighth Legislative Assembly, which amended sections 180 and 615 of the Code of Civil Procedure, and the statute in force respecting a change of the place of trial at that time was section 615, above, before it was amended. Four separate grounds are stated in that section, but it is apparent that this motion could not have been based upon any one of them, unless it was subdivision 4, which provides for a change of the place of trial "when from any cause the judge is disqualified from acting." At that time the disqualifications of a judge to sit or act in an action or proceeding were enumerated in section 180 of the same Code,

and, whatever may be said of the strictures made by this court on the conduct of Judge Harney upon the former trial of this cause, they do not disclose a disqualification, within the meaning of this section. The motion was therefore properly denied.

The objection made to the trial of the cause before Judge Clancy was upon the ground of "lack of jurisdiction, owing to its [said cause] having been transferred to said Department 2 irregularly." It is not contended that the district court of the second judicial district of the state of Montana did not have jurisdiction of this cause. So far as the transfer of the cause from one department to another is concerned, that is a matter controlled by the rules adopted by the several departments of that court for their own convenience. Furthermore there is no showing made of any prejudice to this plaintiff in the transfer of this cause to Department No. 2 for trial.

5. Likewise the contention that the court erred in proceeding to trial on September 16th is without merit. There was no application for a continuance, and no showing made why the plaintiff could not and did not try the case at that time as well as he ever could have done.

6. At the commencement of the trial the plaintiff moved the court to exclude the witnesses. This motion was denied, and error is predicated upon this ruling. Section 3371 of the Code of Civil Procedure provides: "If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses." This statutory provision exists in many of the states, and it is quite uniformly held that the meaning of such a provision is that the application is addressed to the sound legal discretion of the trial court, and that no review will be had, except for a manifest abuse of such discretion. (Abbott's Trial Briefs, Civil Jury Trials, 133, and cases cited.) In the absence of any showing of prejudice, the action of the trial court will not be disturbed.

7. Upon the former appeal in this case this court held that there was a material variance between the pleading—counter-

claim—and the proof and decree, in that the bringing of the suit by Finlen against the Boston and Montana Company appeared from the proof, and was found by the court to have been, a material part of the contract of November 21, 1898, although there was not any allegation in the counterclaim respecting it. After the direct testimony on behalf of defendant Heinze was concluded, the court gave him permission to amend his counterclaim in this regard, and to make other slight amendments. As the matter of the bringing of this suit was testified to and found by the court on the former trial, and the variance was called to the attention of all the parties in the opinion rendered by this court, certainly plaintiff could not plead that he was taken by surprise by the amendment, or that he suffered prejudice by the amendment having been made. We are unable to see wherein the other amendments allowed were of any consequence or could have prejudiced the plaintiff.

8. Numerous errors are assigned upon the rulings of the trial court in receiving and excluding evidence. We have examined these, and, without reviewing them in detail, think no prejudicial error was committed. Special attention may properly be given to one of these assignments. Upon the cross-examination of John MacGinniss, a witness for the defendant Heinze, he was asked if he knew one Ada H. Brackett. An objection to this question was sustained, whereupon counsel for the plaintiff made the following offer of proof: "The purpose is, and I expect to show, if I am allowed to get answers to the questions, that the Ada Brackett referred to in the question was employed by John MacGinniss, in behalf of Mr. Heinze and the Montana Ore Purchasing Company, ostensibly as a stenographer, but really for the purpose of intimately associating with Judge Harney, one of the judges of this court, who tried this cause formerly, as an agent in behalf of F. Augustus Heinze to negotiate for a corrupt decision in this cause, and that she so served the defendant F. Augustus Heinze, with the result that a decision of that character was procured, and that

John MacGinniss, this witness, was the active agent of that operation." An objection to this offer on the ground that it was irrelevant, immaterial, and incompetent, and appeared to be made not in good faith, was sustained, and exception taken. This action of the court was erroneous. In *Beck v. Hood*, 185 Pa. St. 32, 39 Atl. 842, *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884, and *Georgia R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 798, the authorities in support of the proposition that this character of examination may properly be indulged in are collated. The authorities seem to be quite uniform. The purpose of the examination is to show the hostility of the witness toward the party against whom he testifies, or his zeal in behalf of the party for whom he is called as a witness.

But does this error necessitate a reversal? If the evidence excluded was substantive evidence which tended to support the plaintiff's theory of this case, or to destroy the theory of the defendant Heinze, then this court would be compelled to order a new trial. But the only purpose of this character of evidence was to affect the credibility of the witness, and, assuming that evidence tending to prove the facts set forth in the offer had been presented to the court, or assuming the most extreme view, that the witness MacGinniss had waived his constitutional privilege and had admitted the facts set forth in the offer, the utmost then that could have been asked of the trial court would have been that it disregard the evidence given by the witness MacGinniss in so far as the same is not corroborated by other credible evidence. An examination of the record will show that all of the testimony given by the witness MacGinniss touching any material matters connected with this suit is corroborated by the testimony of other witnesses, who, so far as this record shows, are entitled to credence. But we may go further than this, and say that, if we disregard all the testimony given by the witness MacGinniss and hold it for naught, there is still a clear preponderance of the evidence in favor of the findings of the trial court—such a preponderance that, if the district court had disregarded MacGinniss' testi-

mony and had found in accordance with Finlen's idea of this case, this court would be justified in reversing such decision upon the ground that the clear preponderance of the evidence is against such a decision.

9. Again, it is contended that the contract, if proved, is so incomplete that specific performance will not be enforced; and numerous details of a contract such as appellant seems to think this should have been, in order to render it valid, are suggested as having been omitted. We recognize the rule to be as stated by Mr. Justice Story in *Smith v. Burnham*, 3 Sum. 435, Fed. Cas. No. 13,019, as follows: "It is a general rule not to interfere to direct specific performance of any agreement where the terms of the contract are not all definite and full, and in its nature and extent are not made out by clear and unambiguous proof." But what terms are to be made out by clear and unambiguous proof? The particular terms which the parties to the contract saw fit to incorporate in it, or all the terms which an astute lawyer might incorporate in a contract respecting the same subject? Clearly the former, and not the latter, and the mere fact that Heinze and Finlen did not decide upon or even discuss many matters which might properly have been considered and agreed upon by them will not prevent a court of equity from decreeing specific performance of the particular contract with respect to matters upon which they did agree, if such matters make up a complete agreement, with respect to which specific performance can be had. If Heinze and his witnesses are to be believed, then a complete agreement was entered into, and the fact that such an agreement was made and its particular terms are shown by clear and convincing proofs.

10. It is said that there is no mutuality in the contract of November 21st, and that specific performance will not be enforced, and section 4412 of the Civil Code is cited in support of this contention. It is, however, conceded by appellant's counsel that a strictly optional contract may be enforced in equity by the holder of the option in the same manner that

other contracts are. Finlen had leases and bonds upon the Devlin, Reilly, and Kelly interests—interests which he had a right to purchase. These leases and bonds extended for more than one year after November 21, 1898. Finlen had an interest in real estate which he could convey, and such conveyance could have been effected by an assignment of his leases and bonds or by a deed or otherwise.

Furthermore, it appears that defendant Heinze has kept and performed all the terms of the contract by him to be kept or performed, and therefore the defense of a want of mutuality is not available. In *Burnell v. Bradbury*, 67 Kan. 762, 74 Pac. 279, respecting this doctrine, it is said: "It is well settled that, where a contract has been fully performed by one party, want of mutuality cannot be set up by the other as a defense to an action for specific performance. There is no room for the party in default to say that he could not enforce performance for want of mutuality. There is nothing left to be done by anyone but himself. The want of mutuality has no application in an action for specific performance where it is shown that the party seeking relief has fully performed all the conditions of the contract." (2 Beach on Contracts, sec. 889; *Newell's Appeal*, 100 Pa. St. 513; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Grove v. Hodges*, 55 Pa. St. 504; *Lindsay v. Warnock*, 93 Ga. 619, 21 S. E. 127.)

11. Criticism is made as to the character and extent of Heinze's possession of the claim from December 23d to February 24th, and as to the amount expended by him in improving the property. It is said that his possession was not of that exclusive character necessary to entitle him to specific performance, and, as evidence of this, attention is directed to the fact that during such period Wishon, Finlen's foreman, visited the mine four or five times, and at one time, at least, directed Mahoney's attention to the condition of the shaft. But Wishon's testimony is that he had nothing whatever to do with employing or discharging or directing the men, or with the mining operations; and considering that, according to Heinze's

own version, until the options were actually taken up, Finlen had at least a contingent interest in the property, there is nothing in Wishon's visits to the mine inconsistent with Heinze's exclusive possession of it.

It appears from the testimony of Carnochan, Heinze's book-keeper, that during December Heinze paid out on account of work done and materials furnished by him at the mine \$202.19; in January, \$475.72; and from February 1st to 24th, \$3,664.27. This, of course, is in addition to the amount paid out by Finlen under the agreement between MacGinniss and Wishon, and which was to be repaid to Finlen under Heinze's version of the transaction, at least. The amount and character of the work are shown by the testimony of McFarlane and Mahoney, and the returns from the smelter. The work consisted in cleaning out the mine, which had practically been abandoned, and replacing the tracks, air pipes, and other appliances, in repairing machinery already in the mine, in running drifts and cross-cuts in the mine, and in discovering bodies of valuable ore, and mining and smelting the same. Considering the fact that Finlen had spent a not inconsiderable fortune in attempting to discover ore in paying quantities, and had altogether failed, and that he had become discouraged, and had taken out the mining appliances, and, as a number of witnesses say, had declared his intention not to spend any more money on the property, he is hardly in a position to criticise the operations of some one else, who, as the evidence shows, in two or three weeks after taking possession of the property had uncovered ore bodies of sufficient size and value to make it possible for Finlen to recover the \$54,000 which he had all but lost.

12. Finally, it is said that the counterclaim is insufficient. It is said that Heinze does not offer to do equity: First, that he does not specifically offer to pay the \$54,000; and, second, while he specifies the time of making the payments as one and two years, respectively, after he should take up the leases and bonds, he nowhere states when he actually took them up.

1. The allegation in the counterclaim is that Heinze has kept and performed all the conditions of the agreement by him to be kept or performed, and that he was at the time of the filing of this counterclaim, and ever since the 21st day of November, 1898, has been, able, willing, and ready to comply with all the conditions thereof, and that he offers and binds himself that if the court shall decree him to be the owner of Finlen's interest, or, in other words, shall decree a specific performance of the contract as claimed by him, he will then pay to the plaintiff the sum of \$54,000, and, in addition thereto, pay the plaintiff whatever sum he paid for the Kelly interest, for which it appears Finlen has in the meantime procured a deed.

In *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007, this court said: "It is said that the complaint is defective for failing to show a tender of the balance of the purchase money before the action was brought. It is undoubtedly the general rule that, if a part of the purchase price is still due and payable, the plaintiff seeking to have the conveyance compelled must allege and prove a tender of it, and bring it into court. But the rule is not invariable. An exception to it is where it is apparent from the pleading that a tender would be useless. 'Where the vendor claims to have rescinded, repudiates, and denies the obligation of the contract, placing himself in such a position that it appears that, if the tender were made, its acceptance would be refused, then no tender need be made by the vendee. * * * In such case it is enough if the plaintiff offer by his bill to bring in the money when the amount is liquidated and he has his decree for the performance.'" And numerous authorities in support of this doctrine are there collated. If this decision announces the correct rule—and we are satisfied that it does—then it is apparent that the counterclaim contains all the necessary allegations, and is not open to the criticism directed against it.

2. As to when Heinze actually took up the leases and bonds is quite immaterial, except upon a theory suggested by counsel

for appellant—that, if the decree herein is to be enforced, each of the payments of \$27,000 should bear interest from one and two years after such date. And on the cross-examination of defendant Heinze he was asked to give that date, but upon objection the testimony was excluded and an exception taken, but no error is assigned in appellant's brief to this ruling of the court; neither is there any specific objection to the form of the decree in this respect. However, aside from these considerations, we are of the opinion that the court did not err in excluding the evidence. Section 4280 of the Civil Code reads as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

As applied to this case, then, that section means that Finlen is entitled to interest on each of those payments except during such time as he himself prevented Heinze from making them. If Heinze had deposited the amounts in court at the time of filing his counterclaim, no one would insist that he must now pay interest on them; and under the authority of *Christiansen v. Aldrich, supra*, he was not required to make such deposit or tender, for the reason that, as Finlen denied the existence of the contract, such deposit or tender would have been useless. Not only did Finlen deny that any contract whatever was made, but he took the initiative, and commenced this action to recover possession of the property in controversy. So far as this record shows, the only thing which interposed and prevented Heinze from making these payments when they became due was Finlen's own acts, and these bring the case within section 4280, above. This interference on Finlen's part arose before either payment became due, and continued until the trial, so that now, having prevented such payments being made on time, he cannot ask interest by way of damages or compensation for the delay which he himself occasioned.

The judgment and order appealed from are affirmed.

Affirmed.

MR. JUSTICE MILBURN CONCURS.

MR. CHIEF JUSTICE BRANTLY: I do not agree with all that is said in the majority opinion, nor do I concur in the result reached.

Under the Act of 1903 (Second Extraordinary Session of 1903, page 7, chapter 1), I think the rule to be that this court may not disturb the findings of the district court unless the evidence preponderates against them. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6.) This view is supported by the weight of authority and reason, because, under the procedure which must be observed touching the taking of evidence by the trial court, and its reproduction in this court, we cannot on review have the advantage of seeing the witnesses and observing their manner while testifying. These are important elements, which this court cannot consider and weigh. In those states in which the evidence in equity cases is all presented in the form of depositions, these important elements of proof are not before the trial court. Therefore the appellate court can just as well try the case *de novo* and reach an independent conclusion. Under the statute the power of this court is limited merely to review. The findings of the trial court must therefore be treated as *prima facie* correct, at least.

I assume, also, for the purposes of this case, the proposition that a preponderance of evidence is sufficient to support a finding of any fact in a civil case. But these propositions do not conflict with another, especially applicable to cases for specific performance of parol contracts; that all the terms and conditions of the particular contract must be established by the evidence clearly and definitely, and if any of them are left in doubt or uncertainty, or if any part of the contract as set out, as a whole, still rests in treaty and requires further negotiation, it will not be specifically enforced.

It seems to me that the evidence adduced in this case goes beyond the allegations of the defendant's counterclaim, and tends to establish a different contract from that alleged in the pleadings and found by the court. The contract alleged and found is, in brief, that Finlen agreed to assign the bonds and leases to the defendant, and to bring and prosecute the action at defendant's expense, but in his own name, retaining possession for this purpose until the defendant should desire to assume it; that the defendant should pay all the expenses of developing the property, and should, after suit brought, assume the exclusive possession of it, and thereafter observe the covenants and agreements contained in the leases and bonds; that if the property proved valuable, and the defendant should take up the options from the lessors, he would be bound to pay to the plaintiff the sum of \$54,000—one-half within one year from the date of the purchase, and one-half within two years. The development of the property and the purchase by the defendant from the lessors is the part performance relied on as the ground for a specific performance. On November 21, 1898, when it is claimed that the contract was made, about the time the parties separated a difficulty was suggested as to the disposition to be made of the expense to be incurred in looking after the property pending the actual taking possession by the defendant, and compensation for certain supplies on the premises. It was then agreed that the plaintiff should pay all the expenses until possession should be taken, and that he should be reimbursed therefor by the defendant. The supplies left on the property should be paid for by the defendant in the same way. Such expenses as were incurred were paid by the plaintiff, and his supplies were used. Even after possession was taken by the defendant, bills for wages and supplies were paid by the plaintiff to the amount of between two and three thousand dollars. This agreement is not alleged as a part of the contract, and the court, in its findings, disposed of it by finding that it was an independent agreement, made for convenience, and not a part of the contract. The decree makes no provision for the

reimbursement of the plaintiff. The finding of the court is based upon the testimony of defendant's witnesses who were present at the time, and who stated, by way of conclusion, that this agreement was no part of the contract. To my mind, however, the circumstances and the nature of the contract were such that this compact was necessarily a part of it, for the reason that the contract could not have been carried out without some such arrangement. Even in the absence of such an express provision, it would, it seems, have been implied from the very nature of the case. But whether it would have been implied or not, I think the only finding possible under the evidence is that this was one of the provisions of the contract. Not only this, but the payments for supplies and wages after actual possession was taken were but a continuance of this arrangement originally made, in order to bear out the impression that the property was still Finlen's, and that the action brought by him was actually his. According to one of the witnesses, the retention of possession by Finlen for the time being, and the bringing of the suit in his name, was for strategical reasons; and as this feature entered into the contract, and the property had to be cared for in the meantime, it certainly follows that some one was to pay this expense, and, since it was agreed that Finlen should do so, it necessarily follows that this was an element of the contract to be taken into consideration in adjusting the rights between the parties. Otherwise there is no reasonable explanation of the behavior of the parties from the time it is alleged the contract was entered into until the defendant took possession on the 23d of December. Whether this condition of the evidence be denominated a technical variance or a failure of proof (section 772, Code of Civil Procedure), I think it fatal to the decree.

Furthermore, I think the decree should, in any event, be so amended as to require the defendant to pay interest upon the installments of the purchase price from the time at which they respectively fell due, and that for the purpose of fixing these dates the cause should be remanded for further proof. The

defendant has asked that the contract be specifically enforced as made. Conceding that it was made as alleged and found, the decree should adjust the matter of interest. I do not think the section of the statute cited in the majority opinion has any application.

These views may seem somewhat technical, but an action for specific performance of a parol contract proceeds and must be sustained, if at all, upon grounds which are more or less technical.

Rehearing denied June 3, 1905.

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32 580/
32 581/

STATE EX REL. HEINZE, RELATOR, v. DISTRICT COURT
OF SECOND JUDICIAL DISTRICT ET AL., RE-
SPONDENTS.

(No. 2,164.)

(Submitted February 10, 1905. Decided May 1, 1905.)

Prohibition—Office of Writ—Control of Judicial Action.

Prohibition—When It will not Lie to Control Judicial Action.

1. The supreme court will not by prohibition restrain the district court from entertaining and determining a motion to strike an answer from the files and enter judgment by default, under Code of Civil Procedure, section 3306, authorizing such action where a party refuses to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when so required, on the ground that such section is unconstitutional, although the district court may have erroneously decided to uphold the constitutionality of the section, and may, in consequence, eventually make an order which will be in excess of its jurisdiction.

Written Opinions of District Courts—How Viewed by Supreme Court.

2. A written opinion of the district court upon matters and points in controversy in an original application to the supreme court, for a writ of prohibition to restrain that court from acting upon a motion pending before it, submitted in brief of counsel, not being properly before the court, will not be looked to for the purpose of ascertaining the intention of the inferior tribunal in the premises.

District Courts—Jurisdiction—Mistaken Exercise—Prohibition.

3. If the district court has jurisdiction of the subject matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy of prohibition. "It is within its jurisdiction to dispose of the matter rightly or wrongly."

Supreme Court—Prohibition.

4. The supreme court will not grant the writ of prohibition, or any writ, if not properly invocable, even though no objection be made by counsel to the exercise of its extraordinary power in the premises.

Notaries Public—Contempt—Power of District Court to Punish.

5. *Quære*: Under Code of Civil Procedure, section 3306, may the district court lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the district court?

ORIGINAL application for writ of prohibition by the state, on the relation of F. Augustus Heinze, against the district court of the second judicial district, in and for the county of Silver Bow, and George M. Bourquin, a judge thereof. Dismissed. Mr. Justice Holloway dissents.

Mr. M. S. Gunn, Mr. J. M. Denny and Mr. Charles R. Leonard, for Relator.

Mr. A. J. Shores, Mr. C. F. Kelley and Messrs. Forbis & Evans, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

This matter is before us on application for a writ of prohibition upon the relation of F. Augustus Heinze. The petitioner complains that the district court of the second judicial district is about to strike his answer from the files of a certain cause pending in said court, wherein the Boston and Montana Consolidated Copper and Silver Mining Company, plaintiff, sues him for a large sum of money. It appears from the petition and from the answer of the respondent court and judge that the plaintiff caused a certain notary public to issue a subpoena *duces tecum* addressed to the relator herein, directing him to appear before him, the said notary, in order that his deposition might be taken at the request and upon the demand of the plaintiff. It appears that the witness, when his deposition was taken, refused to answer certain questions, and thereafter failed and refused to sign the deposition, whereupon the attorneys for plaintiff appeared in the district court and moved

that the answer of the defendant in the cause then pending, the relator herein, be stricken from the files, and that plaintiff have judgment for the amount demanded in its complaint.

The relator, in his application for the writ, declares that he was required to appear and show cause why the motion should not be granted, and that thereupon he appeared and objected to the jurisdiction of the court to hear the motion or grant the relief therein demanded; "that the said court and the judge thereof threatens to, and will, unless restrained and prohibited by this honorable court, proceed to hear and determine said motion and application, and, if it is found that the statements and allegations in said motion of plaintiff contained are true, will strike the answer of your petitioner from the files, whereupon judgment will be rendered against him for the amount demanded in the complaint." He adds that execution would immediately issue against the defendant.

The provisions of section 3306 (of Title III, relating to "Production of Evidence" and of Chapter II relating to "Means of Production") of the Code of Civil Procedure are invoked by the attorneys for the plaintiff in support of the motion to strike the answer from the files. That section is as follows: "Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out." The court and the judge in the return admit the allegations set forth in the petition, "except the statement contained in the sixth paragraph of the petition, reading: '* * * And, if it is found that the statements and allegations in said motion of plaintiff contained are true, will strike the answer of your petitioner from the files, whereupon judgment will be rendered against him for the amount demanded in the complaint.'" In reference to this allegation the answer states that, unless restrained, the court will proceed with the hearing of said motion, "and will make such order thereon as

in its opinion will be proper under the facts and the law applicable thereto, granting the relief asked for by the plaintiff if the law and the facts require such order, and will hold that the court has power to strike out the answer under section 3306 of the Code of Civil Procedure in a proper case"; and there is an admission in the answer that the court overruled an objection to its jurisdiction—Article V of Amendments to the Constitution of the United States and section 27, Article III, of the Montana Constitution being cited by the objectors to support the contention that the statute is invalid.

The question submitted for determination is this: Is section 3306 of the Code of Civil Procedure constitutional? May the court lawfully, in the case of plaintiff against the defendant, find that the witness is in contempt in refusing to obey the order of a notary public? The answer to this question is of very great importance, but may not be given in this proceeding.

Reading the definition of the writ of prohibition in section 1980 of the Code of Civil Procedure, we find that this court may arrest the proceedings of a district court when such proceedings are without, or in excess of, the jurisdiction of that tribunal. Any citizen may make any motion he may see fit to make, if he do it in a respectful way, in the district court, and it should proceed to hear and determine that motion; that is, dispose of it as the law may require, and either grant or refuse it. If what is asked is without, or in excess of, the jurisdiction of the court, it will deny the motion; if not, it will grant it in whole or in part, or deny it. The motion pending in the court below is to strike the answer from the files and enter judgment in default of answer. The court is now entertaining this motion, and will, unless prohibited by us, decide it. This it is its plain duty to do, and neither the court nor the judge may be prohibited from hearing and passing upon any motion which may arise in any matter pending in the court. If what is asked for in the motion should be granted, and the court should, because of the law being unconstitutional,

do something that it has no authority to do, then the defendant will have his remedy. What that remedy, may be, of course should not at this time be indicated. There is no wrong without a remedy, and if the court should err in its decision there is a speedy and adequate remedy.

The language in which the respondent court and judge have couched the denials of the allegations of the petition as to what the court is doing and is about to do is not as explicit as it might be. Still, we interpret the words of the denials to mean that the court has not any present intention to strike the answer and render and have entered the judgment prayed for in the motion pending before it, but that, although it at present believes the statute to be constitutional, and conferring power and authority upon it to do as prayed, it will examine into all the facts and circumstances, and then, under the law as it shall then appear, do and determine as to it seems necessary and lawful in the premises. This we should not prohibit it from doing.

Although a written opinion of the court upon the matters and points has been submitted to us in the brief of counsel for respondents, it is not in any sense properly before the court, and we have not looked to it for the purpose of learning what is the intention of the lower court.

The court does not in its answer admit what the petitioner alleges—that is, that it is going to strike the answer from the files and enter the judgment prayed for. It says that it is going to hear and determine the motion, and do whatever the law requires to be done. This the court should do. It is true that the answer states that the court will hold that it has power to strike out the answer under the said section. If this is intended to convey the idea that the court below believes that the section is constitutional, still it does not necessarily follow that in this particular case, under the facts and circumstances thereof, the court intends to and will grant the motion complained of.

As we have said, the judge of the district court admits that objection was made to the jurisdiction of the court on the ground that the section referred to was invalid, both under the federal and state Constitutions, in that it deprived the defendant of due process of law, and that the court overruled the objection. This, of course, was tantamount to holding the statute to be valid and constitutional. We are inclined to the belief that the court was wrong in so deciding; but it has not yet passed upon the motion to strike the answer and to enter judgment for plaintiff. It must pass upon the motion. May we, on petition for a writ of prohibition, order the court to deny the motion and go on with the suit? We think not. Shall we grant the writ, which amounts to the same thing as ordering it to overrule the motion? We think not. It is within its jurisdiction to dispose of the motion rightly or wrongly. In this matter the court below, and none other, can have jurisdiction to pass upon the motion made, which motion was made under the statute. If the inferior court has jurisdiction of the subject matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition. (High on Extraordinary Legal Remedies, sec. 767.)

The point that prohibition may not be properly invoked at this stage of the proceedings, if at all, was suggested to counsel at the hearing, but they did not think it necessary to discuss the question. Evidently, to the same degree that petitioner desired the section 3306 declared invalid, to such an extent also the respondents wished to have it decided valid, and both sides apparently wished the serious question as to the section of the Code decided herein. But if we have no authority under the law to grant the writ prayed for, or any writ, under the present circumstances, we shall not do so, even if no objection has been made to our authority. Although we know that the court below is considering what it will do in a matter in which, under a possible state of facts appearing on the hearing, it may, acting under its present belief that the statute is consti-

tutional, finally make an order which it will be beyond its lawful power to make if the section of the Code relied upon be invalid, still we do not think that under such circumstances the court is now without, or in excess of, its jurisdiction.

Under the allegations of the petition and the denials contained in the answer it is apparent, when we consider the definition of the writ of prohibition and when it will lie, that it is not properly invocable in this case. The alternative writ herein is dissolved, and the proceedings dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE HOLLOWAY: I dissent. The answer of the district court admits that that court has acted in considering the motion to strike the answer and affidavits in support thereof; has issued an order to show cause why such motion to strike should not be granted, and, upon objection made that the court had no jurisdiction to determine such motion or strike out such answer, that court has heard argument thereon and has overruled such objection; and, further, after such consideration that court now declares that it "will hold that the court has power to strike out the answer under section 3306 of the Code of Civil Procedure in a proper case." These admissions show that the court has proceeded in this matter relative to the motion to strike, was proceeding therein at the time the alternative writ herein was issued, and, notwithstanding the denials of certain allegations of paragraph 6 of relator's petition herein, when we consider that the facts are not in controversy, and that the law applicable has already been determined by the district court, and held to be constitutional, and applicable to such a motion to strike, it becomes apparent, so far as this record discloses the purpose of that court, that such court will, unless restrained, further proceed, and will strike out the relator's answer.

Section 1980 of the Code of Civil Procedure provides that the writ of prohibition arrests the proceedings of any tribunal exercising judicial functions when such proceedings are with-

out or in excess of the jurisdiction of such tribunal. Certainly the tribunal (district court) was proceeding, and, if it reached the correct conclusion in holding section 3306, above, constitutional, that court was, at the time this application was made, proceeding within jurisdiction; if it erred, and if in fact that section is unconstitutional, then all proceedings taken by the court under that section are *coram non judice*, and prohibition ought to lie, as the case is then brought squarely within the provisions of section 1980, above, defining the purpose and extent of the writ of prohibition. So far as the motion to strike out relator's answer in the lower court is concerned, there is no contention whatever that the proceedings had in that matter were taken under any other authority than section 3306, above; and to hold that the district court can properly proceed in the hearing and determination of the motion to strike is for this court in effect to hold that section constitutional, though not doing so in terms.

If it be said that this application is prematurely made, for the reason that the court has not yet acted to relator's injury, a curious condition is presented; for, after the lower court has acted, and has stricken the answer of relator from the files, it would hardly be contended that prohibition will then lie to restrain the court from doing what it has already done. So that an application made before the court acts on the motion is premature, and one made after the court acts is too late.

In *State ex rel. Anaconda Co. v. District Court*, 30 Mont. 529, 77 Pac. 312, the district judge had merely indicated his intention to proceed and preside at the trial and try a cause after a disqualifying affidavit had been filed, and, upon application of the party filing the disqualifying affidavit this court issued an alternative writ of prohibition, and upon the final hearing determined the constitutionality of the statute under which such disqualifying affidavit was filed, and by peremptory writ prohibited the district judge from proceeding further in the matter. Certainly in that instance the mere announced determination of the district judge to preside at the trial of

that cause could not, of itself, injure anyone, but the relief was granted to prevent the injury which it was claimed would result.

As said above, if the statute (section 3306) is unconstitutional, then the district court was without jurisdiction; if the statute is constitutional, the court was acting within jurisdiction; and therefore it seems to me incumbent upon this court to determine the only question which was argued and submitted for determination, namely: Is section 3306 constitutional? It seems to me that this question should be determined on its merits, and this proceeding not dismissed upon a purely technical question of practice, and one suggested by this court itself, and not argued or considered by counsel for either party. It seems to me that, if prohibition is not the proper remedy in this instance, it is of little, if any, practical use whatever. I am of the opinion that it is the proper remedy, that it was properly invoked, and that this court should determine this application upon its merits.

BUTTE LAND AND INVESTMENT COMPANY ET AL.,
RESPONDENTS, v. MERRIMAN ET AL., APPELLANTS.

(No. 2,090.)

(Submitted March 23, 1905. Decided May 1, 1905.)

*Mines and Mining—Adverse Claims—Suits to Determine—
Effect of Judgment—Parties.*

Mines—Adverse Suits—Government not Party—Effect of Judgment.

1. Under Revised Statutes of the United States, section 2326, the government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contending claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered.

Public Lands—Action Against Government.

2. One may not have his right to public land, as against the government, determined by the courts in an action against the government.

Public Lands—Mining Claims—Adverse Suits—Effect of Judgment.

3. The adjudication in a state court in an adverse suit is not conclusive of the prevailing party's right to the property in controversy as against the government, nor sufficient to divest the government of the title; neither is it of itself sufficient to entitle the prevailing party to a patent.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by the Butte Land and Investment Company and others against R. O. Merriman and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants Merriman and Mason appeal. Reversed.

Messrs. Kirk & Clinton, for Respondents.

The court, in rendering judgment in causes Nos. 3620 and 3621, adjudged that there was no known vein or lode existing at the date of plaintiffs' application for patent in the ground in controversy in those two suits. The location of the so-called "Point Pleasant" and "Pleasant View" lode claims antedated the location of plaintiffs' Butte and Boston placer claim.

A conflict between a lode claim located before the location of the placer claim is the proper subject of an adverse suit. (Lindley on Mines, c. 720, pp. 1303, 1304; *Cripple Creek etc. Min. Co. v. Mt. Rosa M. & M. Co.*, 26 L. D. 622; *Wilson Creek Con. Min. Co. v. Independent T. & M. Co.*, 1 Col. Dec. Sup. 1; *Alice M. Co.*, 27 L. D. 661; *Daphne Lode Claim*, 32 L. D. 513; *Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176; *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863; S. C., 23 L. D. 164; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Raunheim v. Dahl*, 6 Mont. 167, 9 Pac. 892.)

The United States government was bound by the judgments in cases Nos. 3620 and 3621. The determination of ques-

tions, with respect to the right of possession as between adverse mineral claimants, rests solely with the courts. The manner in which the court ascertains the fact, whether by stipulation or otherwise, upon which it renders judgment, is a matter that in no degree affects the conclusive and binding force of such judgment upon the parties to the suit, and the land department, i. e., the government of the United States. (*In re Conway*, 29 L. D. 388; *Richmond M. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1155; *Last Chance Min. Co. v. Tyler M. Co.*, 157 U. S. 693, 15 Sup. Ct. 733; *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74; S. C., 6 Mont. 167, 9 Pac. 892; *Quirk v. Rooney* (Cal.), 62 Pac. 827.)

Defendants are in privity with the United States. A party claiming by location after proceedings for patent have been initiated is in privity with the United States and is bound by the decision of the land office divesting United States title. (*Uinta Tunnel M. & T. Co. v. Creid C. & C. etc. Co.*, 119 Fed. 165, 167.) The land office had jurisdiction of the matter in controversy between the said adverse claimants and the United States government, in the said adverse suits Nos. 3620 and 3621, and having referred the matter to the court, and having issued patent upon the judgments rendered by the court, the matter cannot be again litigated. (*In re Northern Pac. Ry. Co.*, 32 L. O. 342; *Barden v. Northern Pac. Ry. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030; *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Burfenning v. Chicago St. P. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018; *Johnson v. Towsley*, 13 Wall. 62; *Smelting Co. v. Kemp*, 104 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380; *McCormick v. Hayes*, 159 U. S. 332, 16 Sup. Ct. 37; *Northern Pac. R. R. Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671.)

"A patent issued in proper form upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were nonmineral, would, unless set aside and annulled

by direct proceedings, estop the government from contending to the contrary and, in the absence of fraud in the officers of the department, would be conclusive proceedings respecting the title." (*Barden v. Northern Pac. Ry. Co.*, *supra*; *McCormick v. Hayes*, 159 U. S. 332, 16 Sup. Ct. 37.)

Mr. Alex. Mackel, Mr. J. L. Wines, and Mr. C. P. Connolly, for Appellants.

A careful reading of section 2326 of the Revised Statutes of the United States relating to adverse claims shows that the question to be determined in case of an adverse claim is merely the question of possession. Possession was therefore the question, and the only question, at issue and adjudicated in the suits numbered 3620 and 3621. The judgment did not determine the question of whether or not there were any other known veins or lodes upon the ground which the placer claimants might have claimed, but which they did not claim, and which they therefore waived their right to by failure to pay the extra amount to the government; the judgments did not determine the question of whether or not the ground was placer ground; the question at issue was as to whether the lode claims were valid or the placer claims valid, and as to who was entitled to possession and to the better right to sue for patent. (*Aurora Lode v. Bulger Hill Placer*, 23 L. O. 95, 348. See 1 Lindley on Mines, 2d ed., sec. 413; also, *Reynolds v. Iron S. M. Co.*, 116 U. S. 687, 6 Sup. Ct. 601; *Iron S. M. Co. v. Mike & Starr M. Co.*, 143 U. S. 394, 12 Sup. Ct. 543; *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74; *Clary v. Hazlitt*, 67 Cal. 286, 7 Pac. 701; *Mt. Rosa M. M. etc. Co. v. Palmer*, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176; *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590; *Waterloo M. Co. v. Doe*, 82 Fed. 45, 50; *Aurora Lode v. Bulger Hill Placer*, 23 L. D. 95.)

Before a judgment in one action can operate as a bar to another, it must appear that the precise question involved in the second action was raised and determined in the first. (*Bell v. Merrifield*, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E.

55; *Palmer v. McMaster*, 10 Mont. 390, 25 Pac. 1056; *Meyendorf v. Frohner*, 3 Mont. 318; *Kleinschmidt v. Binzall*, 14 Mont. 31, 54, 43 Am. St. Rep. 604, 35 Pac. 460.)

A judgment in an action to recover the possession of real property under the Code of Civil Procedure is conclusive between the parties and their privies as to all matters put in issue and passed on in the action, and is a bar to another action between them when the same matters are *directly* in issue. The bar of such a judgment is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded from showing in a subsequent action any new matters occurring after its rendition, which give the defeated party a title or right of possession. (*Thrift v. Delaney*, 69 Cal. 188, 10 Pac. 475; *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; *Mahoney v. Van Winkle*, 33 Cal. 458; *Montgomery v. Whiting*, 40 Cal. 299; *Amesti v. Castro*, 49 Cal. 325; 1 Herman on Estoppel, sec. 93; *Merriman v. Bachioni*, 112 Cal. 195, 44 Pac. 481; *Breon v. Robrecht*, 118 Cal. 471, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33.)

The former judgment of a court having jurisdiction over the subject matter and the parties is a bar to a second suit upon the same cause of action between the same parties or those claiming under them, and such a judgment is conclusive upon any question *directly* involved in the suit, and upon which it depends, although the subject matter of the second action be different. It must appear, however, that the subject matter or question was not only the same, but that it was submitted on its merits and actually passed upon by the court. (*Gray v. Dougherty*, 25 Cal. 272, 273.) For general discussion of the principle of estoppel by record, see 1 Herman on Estoppel, secs. 94-111; *Packet v. Sickels*, 5 Wall. 592; *Maloney v. Finnegan*, 40 Minn. 281, 41 N. W. 979. The government was not in any sense a party to the actions numbered 3620 and 3621. (*Perego v. Dodge*, 163 U. S. 168, 16 Sup. Ct. 971.) When a judgment or decree is rendered by consent, or is the result of

a compromise, it cannot be admitted as *res adjudicata*. (*Wadhams, et al. v. Gay*, 73 Ill. 434; *Mussey v. Bates*, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 517.) The judgments in causes numbered 3620 and 3621 were entered in accordance with stipulation of the parties.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On December 20, 1890, S. V. Kemper and Josephine Lorenze, the predecessors in interest of these plaintiffs, located the Butte and Boston placer mining claim in Silver Bow county, Montana, and on May 11, 1891, made application in the land office for patent therefor. Thereupon Charles S. Passmore and another filed their protest and adverse claim to a large portion of the ground included within such placer location, basing their rights upon the Pleasant View lode claim and the Point Pleasant lode claim. The adverse claims were allowed, and, within the time limited by law, adverse suits were duly commenced in the district court for Silver Bow county, and such proceedings had therein that in each of these suits a judgment in favor of the defendants Kemper and Lorenze was duly entered, a certified copy thereof filed in the land office, and on December 19, 1895, a patent was issued for the placer claim to Kemper and Lorenze, the applicants therefor. In January, 1901, this action was commenced by these plaintiffs, who had succeeded to the interests of Kemper and Lorenze, against the defendants Merriman, Mason, MacGinniss, and Heinze, for damages for ores alleged to have been taken from the ground within the Butte and Boston placer, and for an injunction to restrain further mining operations by such defendants.

Defendants MacGinniss and Heinze answered, disclaiming any interest in the property, and denying any trespass upon it. The defendants Merriman and Mason answered, denying the allegations of plaintiffs' complaint, and, by way of an affirmative defense or counterclaim, set forth that the plaintiffs' claim

to the property in controversy is founded upon the Butte and Boston placer patent; that, at the time application for such patent was made, there existed within the confines of such placer claim a known lead or lode of rock in place, bearing gold, copper and other valuable minerals; that, by direct reservation in the placer patent, this known lead or lode was excepted from the grant to Kemper and Lorenze; and that thereafter, on March 19, 1900, Kift and Knoyle duly located on such known lead or lode the Hornet quartz lode mining claim; that they duly complied with the laws, rules, and customs in completing such location and filing for record a sufficient declaratory statement; that by mesne conveyances these defendants, Merriman and Mason, succeeded to the rights of Kift and Knoyle; that the Hornet lode claim covers the same ground and is part and parcel of the ground claimed by the plaintiffs as the Butte and Boston placer; that thereafter, in May, 1900, defendant Merriman located on such known lead or lode the Gulf, Hope, Rabbit and Olivia quartz lode mining claims; that he complied with the laws, rules and regulations in completing each of such locations, and filed proper declaratory statements therefor; that each of these claims is part and parcel of the same ground that is claimed by the plaintiffs under the patent for the Butte and Boston placer; and that by mesne conveyance defendant Mason became the owner of a one-half interest in and to each of these last-mentioned lode claims. It is then set forth that J. H. Burns, William Burns, James Doyle and Perry Delmas claim some interest in the disputed premises adverse to these defendants. The prayer of the answer is that Burns, William Burns, Doyle, and Delmas be brought in, and be required to set up their interest, that the same may be adjudicated; that these defendants, Merriman and Mason, be adjudged to be the owners of the ground comprised within the limits of their several lode claims; and that the other parties to the action be enjoined from trespassing upon or mining ores in such claims. By order of the court, J. H. Burns, William Burns, Doyle, and Delmas were brought in, and set forth that

they were lessees operating in the disputed ground under a lease from the plaintiffs.

To the answer and counterclaim of defendants Merriman and Mason, the plaintiffs replied, denying that at the date of the application for patent to the Butte and Boston placer there was any known lead or lode within the ground embraced within the placer application, denying the other allegations of the answer, and pleading the former adjudication in the suits by Passmore and others against Kemper and others, numbered 3620 and 3621, as estoppels against the defendants Merriman and Mason.

On June 5, 1903, the cause came on for trial before the court, sitting with a jury, whereupon the following proceedings were had: To sustain the allegations of their complaint and reply, the plaintiffs introduced in evidence the records of the location of the Butte and Boston placer; the application for patent therefor; protest and adverse claim of Passmore and others; the conveyances by which these plaintiffs succeeded to the interests in the ground in dispute; proof of the conflict between the Butte and Boston placer and the Pleasant View and Point Pleasant lode locations, and showing that the Butte and Boston placer ground was not all comprised within those lode locations; the patent to the Butte and Boston placer; and the judgment-rolls in causes 3620 and 3621. They then waived their claim for damages and rested. The defendants Merriman and Mason then sought to show that at the date of the application for patent for the Butte and Boston placer there existed a lead or lode of rock in place, bearing gold, copper and other valuable minerals, which lead or lode was known to Kemper and Lorenze, the patentees; but this was objected to as to any portion of the ground within the boundaries of the Butte and Boston placer which had been embraced within either the Pleasant View or Point Pleasant lode claims, and this upon the theory that it was an attempt to impeach by oral testimony the judgments in causes Nos. 3620 and 3621. This objection was sustained by the court in the following language: "My

holding, understand, as to this area in conflict, is that that was tried and a judgment was entered, and that that is conclusive as to that area. But from the map here there is an area outside of that to the east, and this evidence might be competent as to that portion. I will sustain this objection, unless shown to be without or on the outside of the area in conflict with the Point Pleasant and Pleasant View, and involved in the controversy in those two causes." Further examination of the witness then on the stand developed that, at the time application for the Butte and Boston placer patent was made, there was no known lead or lode within the boundaries of that claim, and without the boundaries of either the Pleasant View or Point Pleasant lode claim; and counsel for the defendants Merriman and Mason then renewed their attempt to show that there was such known lead or lode within the confines of the Butte and Boston placer, and within the ground claimed by the Pleasant View and Point Pleasant lode claims, at the time application was made for the Butte and Boston placer; but all this evidence was excluded, and all further offers of this character of proof rejected, upon the theory that the judgments in 3620 and 3621 were conclusive of the fact that at the date of the application for patent to the Butte and Boston placer there was no known lead or lode within its boundaries.

Upon the conclusion of the testimony the court gave to the jury an instruction as follows: "The court instructs the jury that plaintiff has introduced in evidence documentary proofs, free from legal objection, showing title to all ground in controversy to be in them; that defendants have offered no competent or material evidence contradicting plaintiffs' proof. You are therefore instructed to find a verdict to the effect that plaintiffs are the owners and entitled to the possession of all ground in controversy in this action." In compliance with this instruction, the jury returned a verdict in favor of the plaintiffs, and a judgment was entered thereon, from which judgment, and an order overruling their motion for a new trial, defendants Merriman and Mason appealed.

The only question for determination is, are the judgments in causes Nos. 3620 and 3621 conclusive, as against the defendants Merriman and Mason, of the fact that, at the date of the application for the patent to the Butte and Boston placer claim, there was not any known lead or lode within the boundaries of that claim? If this is answered in the affirmative, then the ruling of the trial court was correct; if not, then it was erroneous.

Under the pleadings in causes 3620 and 3621 it may be conceded, for the purpose of this decision, that, as between the parties to those actions and their privies, there was an adjudication of that fact. It is also a conceded fact that defendants Merriman and Mason were not parties to either of those actions, and are not claiming under anyone who was designated as such. But on behalf of respondents here it is contended that, though not nominally a party, yet, as a matter of fact, the United States government was actually a party, and as such was bound by the judgment in each of those actions, and, as the only claim of defendants Merriman and Mason is founded upon rights acquired from the government by virtue of their lode locations, therefore they are in privity with the government, and likewise bound to the same extent as though actually parties by name.

But in what sense was the government a party to either of those suits in the district court? It was not a party plaintiff asserting any right, and it has never consented to be made a defendant and to be sued in the state courts; neither did it intervene to have any supposed right of its own adjudicated. But it is contended that the government is bound by the judgment in an adverse suit, and *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 694, 15 Sup. Ct. 737, 39 L. Ed. 859, is cited in support of this contention. In the course of the opinion in that case it is said: "An applicant for public lands cannot have his right thereto as against the government determined by the courts in a suit against the latter. (*United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90.) The only

jurisdiction which the district court could have was of a controversy between individual claimants; and, though its judgment is by statute made conclusive upon the government of the rights of the party in whose favor the judgment goes, it is none the less true that the condition of jurisdiction is a controversy between individual claimants."

Section 2326, Revised Statutes of the United States (United States Compiled Statutes of 1901, page 1430), which makes provision for the proceedings to be had in case an adverse claim be filed to an application for patent, among other things provides: "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." This is the only provision under which the government has agreed to be bound by the judgment of a state court, if at all, and to what extent has it done so in this instance? It has said, in language which is free from ambiguity, that for the purpose of determining which, if either, of two claimants is entitled to possession of the ground in controversy, it will relegate them to the local courts, where such question may be determined, and, when determined,

the government will accept the judgment as conclusive, as between the parties to it, of the right of the prevailing party to assert his claim before the land department. In other words, the government has merely said that it will accept a certified copy of the judgment-roll in the adverse suit as a part of the prevailing party's proof before the land department, just as it has said it will accept the surveyor general's certificate that \$500 worth of work has been done, or improvements made, as evidence of that fact. The government is not bound by the adjudication, except in the limited sense that it has declared in advance by statute that it will accept the judgment as determinative of the single question—the right of possession—as between the contending claimants. With any other question which may have been involved in the litigation the government has no concern.

The adjudication in the state court is not conclusive of the prevailing party's right to the property as against the government, nor sufficient to divest the government of the title; neither is it of itself sufficient to entitle the prevailing party to a patent. In *Re Alice Placer Mine*, 4 L. D. 314, Mr. Justice Lamar, then Secretary of the Interior, said: "The judgment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established. The party thus placed in possession may 'file a certified copy of the judgment-roll with the register and receiver.' But this is not all. He may file 'the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.' Why file this, or anything further, if the judgment-roll settles all questions as to title and right to patent? Clearly, because the law vests in the commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. His judgment should there-

fore be satisfied before he is called upon to take final action in any case. In this case the judgment of the court ended the contest between the parties, and determined the right of possession. The judgment-roll proves the right of possession *only*. The applicant must still make the proof required by law to entitle him to patent. (*Branagan et al. v. Dulaney*, 2 L. D. 744.) The sufficiency of that proof is a matter for the determination of the land department. It follows, therefore, that further hearing may, if deemed necessary, be ordered, for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith. To hold differently, and to say that, after the presentation of the judgment-roll, nothing remains for the commissioner save the ministerial acts of preparing and issuing patent, would be to say that the land department loses all jurisdiction in a case after commencement of suit by an adverse claimant. I am well satisfied that the law contemplates no such condition of affairs." This decision is cited with approval by the supreme court of the United States in *Perego v. Dodge*, 163 U. S. 168, 16 Sup. Ct. 971, 41 L. Ed. 113, where it is also said: "Thus the determination of the right of possession *as between the parties* is referred to a court of competent jurisdiction in aid of the land office."

The government might have made provision for such adverse controversies in the land office, for the disposition of the public lands is vested in the executive department of the government, and is a matter of administration rather than of judicature; but, owing to the limited facilities of the land office for conducting such trials, and for the better accommodation of contestants, they are relegated to the state courts where the land is situated.

To say that, in an adverse suit by A against B, either party can have his claim to a particular piece of mining ground litigated as against the government, is to say that one may do by indirection that which he cannot do directly, for it is settled beyond controversy that one may not have his right to public

land, as against the government, determined by the courts in an action against the government. (*United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90; *Last Chance M. Co. v. Tyler M. Co.*, *supra*.)

In speaking of these adverse suits in the state courts, the supreme court, in *Perego v. Dodge*, *supra*, further said: "It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that *the United States is not a party to the proceedings*. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands, as against the government, may be determined by the courts in a suit against the latter."

These considerations seem sufficient in determining that the government is not a party to an adverse suit; and as these defendants, Merriman and Mason, were not parties to either suit (3620 and 3621), and are not in privity with anyone who was, it follows, as a matter of course, that they are not concluded by the judgments rendered in these actions. (24 Am. & Eng. Ency. of Law, 2d ed., 724.) We are therefore of the opinion that the trial court erred in excluding the offered proof.

The judgment and order overruling defendant's motion for a new trial are reversed, and a new trial ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

Rehearing denied June 3, 1905.

FARRELL, RESPONDENT, v. GOLD FLINT MINING COMPANY, APPELLANT.

(No. 2,093.)

(Submitted March 25, 1905. Decided May 8, 1905.)

Mining Corporations—Money Advanced—Liability—Evidence—Admissibility—Security—Directors—Powers—Work and Labor—Claim—Bona Fide Holder.

Mining Corporations—Money Advanced by Employee—Recovery.

1. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff, general manager of the company, in payment of services of certain employees of defendant, testimony of plaintiff that he turned over certain concentrates to the secretary of the defendant, and that he advanced the money with the understanding that he should be reimbursed therefor from the proceeds of the concentrates, conclusively limited his recovery to the amount realized from the sale of such concentrates.

Mining Corporations—Money Advanced—Recovery—Evidence.

2. In an action against a mining corporation to recover money alleged to have been advanced by him, as general manager of the company, in payment of services of certain employees of defendant, with the understanding that he be reimbursed from the proceeds of certain concentrates turned over to the secretary of the corporation, plaintiff was not entitled to recover in the absence of evidence showing that the concentrates were sold and a sum sufficient to reimburse him received therefrom.

Mining Corporations—Powers of Secretary.

3. The secretary of a mining company, who is not a member of the board of directors nor the agent of the corporation, has no authority to act for it beyond that given him as such secretary.

Mining Corporations—Liability—Directors—Evidence.

4. Evidence that three directors of a mining corporation acknowledged the justness of a claim against the corporation, and agreed that it should be paid, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity, does not establish an obligation against the corporation.

Corporation Acts Through Board of Directors.

5. A corporation acts through its board of directors as an entity, and not through the individuals who compose such board.

Mining Corporations—Money Advanced—Liability—Cross-examination.

6. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff as general manager, in payment of services of certain employees of defendant, a written contract between the plaintiff and defendant, providing that the plaintiff should at no time during the continuance of the agreement incur any indebtedness in excess of the value of the result of the operations

which should create any liability against the company, and limiting plaintiff's compensation to twenty per cent of the net proceeds of the mining operations, was admissible as part of the cross-examination of the plaintiff.

Mining Corporations—Work and Labor Claim—*Bona Fide* Holder.

7. One who took a claim against a mining corporation for labor performed while he was manager of the property with knowledge that he had no authority to incur any expense beyond the value of the proceeds of the mining operations, is not entitled to recover thereon in the absence of evidence showing that there were sufficient products of his mining operations on hand to pay the claim; nor is he a *bona fide* purchaser for value, having taken the claim with full knowledge of the limitation of his authority to incur expense.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by J. D. Farrell against the Gold Flint Mining Company. From an order granting a new trial, defendant appeals. Reversed.

Messrs. Foot & Pomeroy, for Appellant.

Messrs. Noffsinger & Folsom, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in September, 1899, by the filing of a complaint containing two causes of action. The first is for the recovery of \$425.25, alleged to have been furnished by the plaintiff, Farrell, to the defendant company, and which amount the company promised to repay, but failed and neglected to do so. The second cause of action is for the recovery of \$20. It is alleged that the defendant company was indebted to one Lepper in the sum of \$20 as a balance for wages for work performed by Lepper for the company, and that Lepper sold and assigned his claim to this plaintiff, and that the same has never been paid. The answer is a general denial of all the material allegations of the complaint.

The court instructed the jury orally to the effect, that under the contract in evidence the plaintiff could not create any indebtedness against the defendant company in excess of the value of the concentrates on hand; and, further, that any agree-

ment on the part of the company to repay the plaintiff would have to be done by a vote of the board of directors at a meeting called for that purpose. The court then submitted to the jury two questions for its determination: First, did the plaintiff furnish to the defendant the money in question mentioned in the first cause of action? And second, did the company authorize its secretary to execute the duebill or writing showing an indebtedness on the part of the defendant company to Farrell? The court then reiterated this statement in the following language: "I think I have made the issues sufficiently plain that, if the plaintiff furnished the defendant any money, as alleged, the defendant was not bound to pay in excess of the value of the concentrates then on hand, nor, in any event, unless the board of directors of the company had authorized it, through its secretary, or in any other way, to pay the amount." The jury returned a verdict in favor of the defendant company, and upon motion of the plaintiff the court granted a new trial, from which order this appeal is prosecuted.

The only evidence offered on behalf of the plaintiff was the testimony of the plaintiff himself, given by deposition. He testified that he was employed by the defendant company as its general manager to operate its mine and mill in Flathead county; that the contract for his employment was made in 1898, and in a general way he told of his operations of the company's property during July and August of that year; that in such operations he employed Moffett as mill foreman, Gillis as mine foreman, and Lepper as a laborer; that the operations at the end of July were unsatisfactory, and at the close of August the plaintiff and his foremen had satisfied themselves that the property could not be operated at a profit. The plaintiff made this report to the company, and filed with the company his resignation on September 14, 1898, as provided in his contract of employment. On September 15, 1898, he met with the board of directors of the company at Spokane, and it was then determined that operations under his management should cease, and the services of Moffett and Gillis be dispensed with.

He testified that at that time there were certain concentrates on hand at the mill, and the value of these was estimated, and it was thought that, after paying outstanding claims for labor, material, etc., there would still be a small balance due the plaintiff, but this he agreed to contribute to the company, as the operations had been disappointing; that Mr. Daigler, the secretary of the company, took over the accounts and certified to their correctness. Under the terms of his employment the plaintiff was entitled to handle the mine products. He further testified: "I turned over the concentrates on hand to Mr. Daigler, with the understanding that he would pay the accounts which had been submitted to him and acknowledged as correct from the proceeds of the shipments." He testified that there was then due Moffett and Gillis, over and above the amount of money which the company had on hand, \$425.20; that these men demanded their pay, and, as the company had no funds, and was without responsibility, the plaintiff advanced the sum named above, with the understanding that he was to be reimbursed from the proceeds of the sale of the concentrates. He further testified that a statement showing the amount due Moffett and Gillis and its payment by plaintiff was then made out, and certified by the secretary, and given to the plaintiff, which was introduced in evidence, and is as follows:

"Gold Flint Mining Co., to J. D. Farrell, Dr.

To amount paid T. J. Moffett in full to date. \$274.52

To amount paid J. Gillis in full to date. . . . 182.52

\$457.04

Less amt. in bank per financial statement. . . 31.84

\$425.20"

"Spokane, Wash., Sept. 15th, 1898.

"The above is correct as per statement rendered by J. D. Farrell.

"GOLD FLINT MINING CO.,

"L. E. DAIGLER, Secty."

The plaintiff further testified: "I repeatedly wrote Mr. Daigler requesting remittance of the amount advanced by me, and was later informed that the proceeds from the sale of the concentrates were not sufficient to meet the indebtedness; that in fact some amounts were still due other creditors, and that there were no funds to reimburse me." The plaintiff reiterates the statement of the agreement under which he advanced the money to pay Moffett and Gillis as follows: "I furnished the money to pay Moffett and Gillis upon the demand of these men, and by agreement with Mr. Daigler. The company was to reimburse me for the payment of this money from the proceeds of the sale of the concentrates." He further testified: "Since this money has been advanced, Messrs. Voorhees, Merin, and Irwin have admitted to me the correctness of this account, and that it should be paid, and they are directors of the company."

Upon the cross-examination of this witness there was introduced in evidence, over the objection of the plaintiff, the written contract of his employment as general manager of the defendant company. Among other things, that contract provides that the operating expenses, the transportation and treatment charges of ores, and the ordinary repairs should be paid from the gross proceeds of the mining operations, and the balance should be divided as follows: twenty per cent to the plaintiff, Farrell, and eighty per cent to the defendant company. The twenty per cent to be paid to the plaintiff was to be in full compensation for his services as manager of the property. The contract contains this further provision: "It is further understood and agreed by and between said parties, that said party of the second part [Farrell] shall at no time during the continuance of this agreement, incur any indebtedness in excess of the value of the result of the operations, which shall create any liability whatever against said party of the first part [the company]." Under the contract the plaintiff was given absolute authority to direct the operation of the business of the property and to handle the proceeds of the mining operations.

On behalf of the defendant evidence was introduced tending to show that the concentrates on hand on the 15th of September were disposed of, and the proceeds, which were very small, applied to the payment of the accounts turned over by Farrell to the company. The witness Merrin, one of the directors of the company, testified that his understanding of the agreement was that any funds from the sale of the concentrates left over and above after paying the labor and material accounts would go to the plaintiff in repayment of the amount advanced by him to Moffett and Gillis; but this witness says that he does not remember that there was any balance after the other claims were paid. He further testified with reference to plaintiff's Exhibit "A," above, that no authority whatever was given to Mr. Daigler to sign that paper, and that Daigler was not a member of the board of directors.

As to the second cause of action plaintiff testified that he had employed Lepper from July 16th to September 15th; that at that time there was a balance due to Lepper of \$71.75; that on September 21st he advanced to Lepper \$20; that the company afterward paid to Lepper the balance of the account; that he took an assignment of the claim for the \$20 advanced by him. An effort was made to show the character of work performed by Lepper and the value of his services, but this evidence was excluded. Plaintiff then sought to show the written assignment of the Lepper claim to him, but upon objection this evidence was also excluded. However, the plaintiff does testify that he became the owner of the claim on September 21st. There was, however, no identification or attempted identification of the signature of Lepper to the assignment, and at the close of the testimony the court, of its own motion, struck out all the testimony respecting this second cause of action.

The motion for a new trial was made upon a statement of the case, which specified as the errors relied upon (1) the insufficiency of the evidence to justify the verdict, and (2) errors of law occurring at the trial. The particular errors of law

specified are to the rulings of the court in excluding testimony as to the value of Lepper's services, as to the character of those services, as to the present ownership of the Lepper claim, the exclusion from the consideration of the jury of Lepper's bill, the assignment of the same to plaintiff, and Lepper's receipt for \$20 paid by the plaintiff to him, the ruling of the court in admitting in evidence the contract between plaintiff and defendant, the action of the court in withdrawing from the jury's consideration all the evidence respecting Lepper's claim, and the errors of the court in its instructions to the jury.

Respondent contends that from the instructions it is apparent that the trial court misapprehended the character of the action, and considered it as one upon the contract, whereas the action is for money paid out for the use and benefit of the defendant company, and, as far as the evidence shows, paid out after the contract had ceased to have any binding force or effect, as it was after the plaintiff had presented his resignation to the defendant company. However this may be, the court was right in saying to the jury that the plaintiff could not recover beyond the amount realized from the sale of the concentrates, and could not recover in any event unless the promise to pay him was made by the defendant company, acting through its board of directors. The evidence on behalf of the plaintiff himself is conclusive as to the first proposition. He says that he turned the concentrates over to Mr. Daigler, and that he advanced the money to Moffett and Gillis with the understanding that he should be reimbursed therefor from the proceeds of the sale of the concentrates. It then became incumbent upon him to show that the concentrates were sold, and a sum sufficient to reimburse him received therefrom; and upon this there is no evidence whatever in the record. In the second place, he says this agreement was made with Mr. Daigler. It appears that Daigler was the secretary of the corporation, but not a member of the board of directors, and, so far as this record shows, was not the agent of the company, nor had any authority to act for the company, beyond the authority given

him as such secretary. So far as this record shows, then, the agreement was made by the plaintiff with Daigler, and not with the corporation at all. He testified that members of the board of directors acknowledged the justness of his claim, and agreed that it should be paid; but whether these directors—Voorhees, Merrin and Irwin—constituted a majority or only a minority of the board is not apparent. In any event, a corporation acts through its board of trustees as an entity, and not through the individuals who may happen to compose such board. The case of *Clarkson v. Kennett*, 17 Mont. 563, 44 Pac. 88, is not in point. In the opinion in that case it is said that the record shows that the money was advanced upon the express orders and requests of the defendant.

Under this view of the case, we think the court was in error in granting the plaintiff a new trial as to the first cause of action; for under this view the plaintiff cannot recover as against the defendant company in any event, and therefore the error in the first part of the instructions, if error, was harmless. There was no error in admitting in evidence the contract between plaintiff and the defendant company. It was properly a part of the cross-examination of the plaintiff.

As to the second cause of action: It appears that the Lepper claim was for services performed by Lepper as an employee of the defendant company, employed by and working under the directions of plaintiff, Farrell. At the time Farrell took the assignment of this claim, in September, 1898, he did so knowing that under his contract of employment he had no authority whatever to bind the corporation for any amount beyond the proceeds of the mining operations. It was therefore incumbent upon him to show that when he took the assignment of this claim there were concentrates or other products of his mining operations on hand sufficient to pay this claim. As he made no effort to show this fact, we are of the opinion that the court properly withdrew all testimony concerning it from the consideration of the jury. It may be said that at the meeting of September 15, 1898, the value of the concentrates on hand

was estimated, and according to that estimate there was sufficient to pay off all claims against the company. But, on the other hand, the evidence of director Merrin on behalf of the defendant is that these concentrates were left at the mill; that when the mining operations ceased, and there was no incoming freight, the freight rates on the concentrates out were so greatly increased as to consume a very large portion of the value of the concentrates as estimated. And if it be said that, as against the company, Lepper could assert his claim, or that any *bona fide* holder thereof could likewise assert the same as against the company, it is sufficient answer to say that the plaintiff, Farrell, does not stand in the position of a *bona fide* purchaser for value, as he took the claim with full knowledge that he had no authority whatever to incur any expense beyond the value of the proceeds of the mining operations. We find no error in the action of the court in excluding from the consideration of the jury the evidence respecting this second cause of action. The court erred in granting a new trial, and the order to that effect is reversed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

32	424
133	9
33	132

32	424
37	334

BENEPE-OWENHOUSE COMPANY, RESPONDENT, v.
SCHEIDEGGER, APPELLANT.

(No. 2,171.)

(Submitted March 25, 1905. Decided May 22, 1905.)

*Receivers—Ex parte Appointment—Existence of Exigency—
Burden of Proof—Mode of Showing—Verified Complaint.*

Accounting—Complaint—Injunction—Receivers.

1. *Obiter:* Where the complaint in an action for an accounting fails to state a cause of action, the ancillary relief of injunction or the appointment of a receiver will be denied.

Receivers—Appointment—Exigency—Burden of Proof—Appeal—Record.

2. Under Code of Civil Procedure, section 951, authorizing the *ex parte* appointment of a receiver only when there is immediate danger of the removal, loss, or destruction of the property or fund, the burden is on the applicant to show that such an exigency exists as to authorize the appointment *ex parte* and when the case is brought before a court of review, such showing must affirmatively appear from the record.

Receivers—Complaint—Verification.

3. An *ex parte* order appointing a receiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information and belief" is insufficient.

Receivers—Appointment—Emergency.

4. The appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency.

Appeal from District Court, Gallatin County; W. B. C. Stewart, Judge.

ACTION by Benepe-Owenhouse Company, a corporation, against Jacob Scheidegger. From an order overruling a motion to vacate an order appointing a receiver, defendant appeals. Reversed.

Mr. John A. Luce, for Respondent.

There is nothing in sections 950 and 951 of the Code of Civil Procedure which would preclude the court from acting upon the complaint of a corporation verified as provided by section 731 of the Code of Civil Procedure. The allegations in the complaint are made with the utmost positiveness. Nothing is stated therein upon information and belief. It is true Mr. Benepe in said verification averred that the matters stated in the complaint are true "to his best knowledge, information and belief." This is a positive statement that the facts are true; it is not a statement made upon information and belief. It has been held that where an affidavit is sworn to upon the belief of the party it is equivalent to swearing that it is true. (*Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787, 788; *Christopher v. CondoGeorge*, 128 Cal. 581, 61 Pac. 174, 175.)

It has been held that the word "belief" in a verification of this kind can be rejected as surplusage and that it amounts to

a positive affidavit. (*Seattle Coal etc. Co. v. Thomas*, 57 Cal. 197; *Kirk v. Rhoades*, 46 Cal. 399-404; *Curry v. Baker*, 31 Ind. 151.) The form for a verification of a corporation having been provided, it was necessary to follow the statutory form and this was sufficient. (*Ely v. Fisby*, 17 Cal. 250, 257, 258; *Kirk v. Rhoades*, *supra*; *In re McCauly*, 94 N. Y. 574, 577, 578; 22 Ency. of Pl. & Pr. 1045; *State v. Anderson*, 26 Fla. 240, 8 South. 1.)

The statement that the allegations of the complaint are true is positively made and the words "information and belief" may be treated as surplusage. Furthermore, if the affidavit for the appointment of receiver is insufficient or defective a new affidavit may be put in. (17 Ency. of Pl. & Pr. 736, 737, and cases cited; *Martin v. Burwyn*, 88 Ga. 78.)

Messrs. Walrath & Patten, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 2, 1903, Benepe-Owenhouse Company, a corporation, entered into a contract in writing with one Jacob Scheidegger, by the terms of which certain real estate and personal property were leased to Scheidegger for a term of five years. In January, 1905, this action was commenced by the company against Scheidegger. The complaint sets forth the contract at length, and then alleges that at the time of the making of the contract there was a well-established custom and usage in Galatin county among the farmers and dairymen that under an agreement such as the one mentioned above, settlements for moneys received from the sale of livestock, pork, dairy, and poultry products shall be made monthly at the end of each month, and for crops raised upon the ranch a division thereof shall be made within a reasonable time after such crops are harvested. It is then alleged that this contract was entered into in view of such custom and usage, and that, acting thereon, the defendant during the year 1903 settled with the plaintiff according to such custom and usage, and that such settlements

were made and continued up until February 1, 1904. The value of the livestock and of the dairy, pork and poultry products sold during 1904 is then set forth, and the increase on such livestock is specified. It is also alleged that there was grown upon the ranch during that year three hundred and forty tons of hay, more or less.

The complaint then alleges that at the time of the commencement of this action there was due to the plaintiff from the defendant \$569.22, more or less, as the plaintiff's share of the money derived from the sale of livestock, pork, dairy, and poultry products; that about November 1, 1904, the defendant repudiated the agreement, refused to pay over to the plaintiff its share of the income from the business carried on, and appropriated to his own use the entire proceeds from such business, and threatens to continue to do so, and threatens to sell or otherwise dispose of the hay raised upon the ranch during that year, and to appropriate the proceeds to his own use, and has ousted the plaintiff from any participation whatever in the business so conducted; that the plaintiff has demanded of defendant that he pay over to plaintiff the amount due it, and to divide the hay grown upon the ranch during 1904, but defendant has refused to comply with such demand, and unlawfully excludes the plaintiff from any further participation in the business. It is alleged that the defendant is continuing to carry on the dairy and poultry business and to sell the products thereof, and to sell the pork and pork products, and to appropriate the proceeds therefrom to his own use, and that, unless restrained by the court, he will continue so to do. It is then alleged that the defendant is insolvent, and wholly irresponsible, and cannot respond in damages, and without the interposition of the court the plaintiff's share of the proceeds from such operations will be entirely lost.

The prayer of the complaint is for an accounting, for the appointment of a receiver to take charge of the business pending the litigation, that an injunction issue restraining the defendant from interfering in any manner with the property in-

volved in the controversy, that the agreement be declared rescinded, and the property restored to the plaintiff. The complaint is verified by F. L. Benepe, president of the company, and such verification is as follows: "That he has read the foregoing complaint, and knows the contents thereof; that the facts therein stated are true to the best knowledge, information, and belief of affiant." This complaint was filed on the 12th day of January, and summons issued. On the 13th day of January, and before the service of summons, the judge of the district court appointed a receiver to take charge of the property in controversy and to manage and operate the same.

The bill of exceptions recites that the order appointing the receiver was made without notice to the defendant, and without any hearing of the cause upon its merits; that no affidavit or oral testimony was offered or heard by the said judge in support of such application, and that the order was made solely upon the complaint and the averments therein contained. On February 4, 1905, the defendant made a motion to have the order appointing the receiver vacated. The motion is based upon the ground that the complaint does not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to have a receiver appointed; that the facts stated are not sufficient to justify the court or judge in making an order appointing a receiver without notice; that the complaint is verified upon information and belief only, and not positively; and that the complaint fails to allege particular facts, or any facts or circumstances, showing the necessity for the appointment of a receiver without notice. Upon the hearing this motion was overruled, and from the order overruling such motion the defendant appeals.

It is not seriously contended that upon this appeal this court should be called upon to pass upon the sufficiency of the complaint to state a cause of action. This record does not show any appearance on the part of the defendant, other than his motion to vacate the order appointing the receiver. As the appointment of a receiver or the issuing of an injunction is an-

illary to the action for an accounting, if the complaint does not state facts sufficient to constitute a cause of action for an accounting, of course the ancillary relief would necessarily have to be denied. However, without comment upon the sufficiency of the complaint, we dismiss all of the grounds urged in the motion to vacate the order appointing the receiver except the one urged that the complaint is verified upon information and belief, and not positively.

As recited in the bill of exceptions, there was no oral testimony taken on the hearing of the application for the order appointing the receiver, and no affidavits filed in support of such application. Section 951 of the Code of Civil Procedure provides that the order appointing a receiver shall not be made without notice to the adverse party, unless it shall appear to the court that there is immediate danger that the property or fund will be removed from the jurisdiction of the court or lost, materially injured, destroyed, or unlawfully disposed of. But how shall these facts be made to appear to the court?

Section 3100 of the same Code provides that judicial evidence is the means sanctioned by law for ascertaining in a judicial proceeding the truth respecting a question of fact. Section 3104 provides that there are four kinds of evidence: First, the knowledge of the court; second, the testimony of witnesses; third, writings; and, fourth, other material objects presented to the senses. The recitals in the bill of exceptions in this instance exclude from consideration the first, third, and fourth kinds of evidence. Section 3320 provides that the testimony of a witness may be taken, first, by affidavit; second, by deposition; and, third, by oral examination. The bill of exceptions recites that there was no oral examination of witnesses, that no deposition was presented in support of the application for the order appointing the receiver, and we find that we are limited in our consideration to the one question: Was the application made upon an affidavit?

It may be considered settled beyond controversy that in an application of this character the complaint may be and is consid-

ered as an affidavit, provided it is such in fact; in other words, if it is such a written declaration, under oath, of facts to which the deponent might testify under oral examination. The complaint sets forth in detail the plaintiff's cause of action, and these facts Mr. Benepe alleges are true to his best knowledge, information, and belief. It cannot be ascertained from the complaint itself or the verification what portion of the facts therein alleged are declared upon his own knowledge, what portion upon information which may have been furnished to him from whatever source obtainable, or what portion upon his mere belief, which may be a deduction from facts and circumstances as they appeared to him.

The decisions of courts as to the sufficiency of verifications to pleadings as such, or the sufficiency of affidavits which may have been used in other proceedings, are of little assistance to us in this instance.

If a verification to a pleading conforms substantially to statutory requirements, it is sufficient for that purpose and an affidavit might be sufficient for one purpose and not for another. But the office of the complaint in this case was made to serve the double purpose of a pleading and proof of the allegations contained in it; and in this latter aspect it must be considered from the standpoint of evidence and tested by the rules of evidence, rather than those of pleading and practice. If the allegations are made positively, and sworn to as of the affiant's own knowledge, there is no apparent reason why they may not have convinced the court or judge of their truth, and of the imminent danger in which the property was alleged to be. If the allegations, however positively made, are sworn to only upon information furnished to the affiant by some third person, then they are merely hearsay, and ought not to have been given any evidentiary value, for the evidence necessary to move the appointing power must be legal evidence.

If it be said that it does not appear that any particular allegations are made upon information and belief, it is sufficient to say that it does not appear which, if any, of the allegations are

made upon the affiant's own knowledge; and as plaintiff is seeking to bring this case within the exception to the general rule announced in section 951, above, that a receiver shall not be appointed without notice, the burden is assumed by plaintiff to show that it does come within such exception, and to make such showing by competent legal evidence, and when brought before a court of review this must appear affirmatively from the record itself.

It is contended that the verification is made according to the requirements of section 731 of the Code of Civil Procedure, and this is correct. The verification is sufficient for the purposes which the complaint serves as a pleading, but it does not aid the complaint when offered as proof of the existence of certain facts. If the facts stated in the complaint were known to the personal knowledge of Mr. Benepe, there was nothing to prevent him from embodying them in an affidavit in support of the application, and, if done, the absence of any statutory requirement that the verification must be in a particular form, as when made by a corporation to a pleading, would have permitted him as an individual to state them positively. We are not called upon to say whether or not a verification to a complaint in an action by a corporation may be made positively as of the affiant's own knowledge. Upon this appeal we can consider only the alleged errors presented by the appellant, not those suggested by respondent.

The case of *Christopher v. CondoGeorge*, 128 Cal. 581, 61 Pac. 174, is not in point. In that case the verification to the pleading was in statutory form: that affiant knows the contents thereof, and that the allegations are true of his own knowledge, except as to the matters stated therein on information and belief. This, then, is a positive declaration that all the allegations are true to affiant's own knowledge, except such as appear in the pleading to be upon information and belief; and an examination of the pleading disclosed that there were not any allegations which appeared to be made upon information and belief, and the court thereupon very properly held

that under those circumstances the allegations were all made positively as of affiant's own knowledge.

We do not hold that a complaint in an action wherein the appointment of a receiver is sought must be verified positively as of affiant's own personal knowledge, but we do say it must be done in every such instance wherein the appointment is asked upon the complaint alone, and if not done so, it must be supported by affidavits which have evidentiary value. This is a general rule recognized by the great weight of authority, to which there may be some exceptions, but the present case does not fall within any of the exceptions, if such in fact there are.

The remedy which the law affords by authorizing the appointment of a receiver is an extraordinary one, to be resorted to only in cases of emergency. It is the apparent peril of the property in controversy, the probable cause to apprehend its loss or injury, or the imminent danger of its being removed beyond the jurisdiction of the court, wherein the delay incident to the giving of notice might of itself defeat the ends of justice, that warrants such an appointment being made *ex parte*; but, in any event, the court or judge making the appointment can only act upon legal evidence of the emergency and of the particular facts which bring the case within the exception to the general rule, which requires notice before such appointment can be made.

The authorities are practically uniform in holding that a complaint verified on information and belief furnishes no proof upon which the appointing power can act. (*Burgess & Co. v. Martin*, 111 Ala. 656, 20 South. 506; *Pollard v. Southern Fertilizer Co.*, 122 Ala. 409, 25 South. 169; *New South B. & L. Assn. v. Willingham*, 93 Ga. 218, 18 S. E. 435; *Siegmund v. Ascher*, 37 Ill. App. 122; *Darcin v. Wells*, 61 How. Pr. (N. Y.) 259; *Davis v. Reaves*, 2 Lea (Tenn.), 649; *Grandin v. La Bar*, 2 N. D. 206, 50 N. W. 151; Beach on Receivers, Alderson's ed., sec. 163; High on Receivers, 3d ed., sec. 89; Smith on Receiverships, sec. 384; Alderson on Receivers, sec. 113.)

As the court below acted without any legal evidence before it in appointing the receiver, it should have sustained the motion to vacate the order of appointment, and its refusal constituted reversible error.

The order overruling the motion to vacate the order appointing a receiver is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

MISSOURI RIVER POWER COMPANY, RESPONDENT, v.
STEELE, COUNTY TREASURER, APPELLANT.

(No. 2,175.)

(Submitted May 1, 1905. Decided May 29, 1905.)

*Taxation—Legislative Power—Constitutional Limitations—
County Officers—Duties—Power of Legislature to Pre-
scribe—Assessment of Real Estate—By Whom Made—
Board of Appraisers—Assessor—Statutory Provisions—Con-
stitutionality.*

Legislative Power—Plenary—Constitutional Limitations.

1. In the matter of legislation, the people, through the legislature, have plenary power, except in so far as prohibited by the Constitution, and one denying the authority in any given instance must point out distinctly the particular constitutional provision limiting or prohibiting the power exercised.

Legislature—Duties of County Officers—Constitution.

2. The legislature may not enact any law in conflict with constitutional provisions defining the duties of county officers; but so far as such duties are not prescribed by the Constitution, they may be by legislative enactment.

Board of Appraisers—Statutes—Constitutionality—Assessor.

3. *Held*, that in creating a board of appraisers to fix the valuation of real property for the purpose of assessment by Act of fifth legislative assembly (Session Laws of 1897, p. 195), the legislature was acting within its authority, and that in clothing the board with power to fix the valuation on real property in the first instance, no provision of the Constitution was contravened; hence a taxpayer had

no right to have his property taxed on the valuation as made by the assessor.

Legislature—County Offices—Power to Create.

4. The legislature may create new county offices and devolve upon them duties respecting the management and control of county affairs.

*Appeal from District Court, Lewis and Clark County;
Henry C. Smith, Judge.*

ACTION by the Missouri River Power Company, a corporation, against W. L. Steele, treasurer of Lewis and Clark county. From an order granting plaintiff's application for an injunction *pendente lite*, defendant appeals. Reversed.

Mr. Edwin W. Toole, and Messrs. Bach & Wight, for Respondent.

The tax is illegal and not authorized by law. Section 3698, Political Code of Montana, is unconstitutional, and all proceedings thereunder are unlawful. The principles of law which govern this case are very similar to those involved in the case of *Mutual Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470. When the framers of the Constitution used the word "assessor," they used it advisedly, and with the meaning usually, if we may not in fact say universally, accorded the term. (*Gardner v. Collins*, 2 Pet. 93; *Brewer v. Blongher*, 14 Pet. 178; *Steere v. Brownell*, 124 Ill. 27, 15 N. E. 26; *Martin v. Hunter*, 1 Wheat. 326; *State v. Engle*, 21 N. J. L. 354; 23 Am. & Eng. Ency. of Law, p. 298, and cases; *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Newell v. People*, 7 N. Y. 97; *Gibbons v. Ogden*, 9 Wheat. 188; *People v. Purdy*, 2 Hill, 31.)

Under section 3698, *supra*, all power and discretion is taken away from the assessor. The legislature has virtually made the provision of the Constitution, in so far as an "assessor" elected by the people is concerned, a dead letter. The legislature has overruled the Constitution, and enacted that, instead of an "assessor" being elected by the people, there shall be three assessors appointed by the district judge. It is true that they name these three persons "appraisers," but the name does not

change the fact that they are assessors; and the bare fact that they allow the person elected by the people to retain the title "assessor," while taking away from him all of the duties which that term implies, do not by any means satisfy the constitutional provision that he shall be assessor. We maintain that the legislature has deprived the people of their right to have the unrestricted judgment of the assessor as to the value of their property for the purposes of taxation; that is, unrestricted by the controlling voice of any person other than himself, subject to the provisions as the law may direct to control him as to the procedure he shall follow in reaching his own conclusions of the value of the property, and subject to review by a supervising board. This constitutes the initial step of that process of law, which is "due process of law" authorizing the seizure or sale of property for unpaid taxes.

The following authorities sustain our position that the said tax is absolutely void: *Mutual Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470; *Savings & Loan Soc. v. Austin*, 46 Cal. 415; *Hawkins v. Mangrum*, 78 Miss. 97, 28 South. 872; *Union Pac. R. Co. v. Alexander*, 113 Fed. 352; *Reily v. Lancaster*, 39 Cal. 354; *People v. Hastings*, 29 Cal. 449; *Ferris v. Coover*, 10 Cal. 589; *Desty on Taxation*, vol. 1, p. 450; *Williams v. Corcoran*, 46 Cal. 553; *In re House Bill No. 270* (Colo.), 21 Pac. 476.

Mr. Albert J. Galen, Attorney General, and *Mr. F. W. Mettler*, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal from an order of the district court granting an injunction *pendente lite*. The object of the suit is to restrain the county treasurer of Lewis and Clark county from selling certain real estate belonging to plaintiff for delinquent taxes assessed against such property for the year 1902.

It is alleged in the complaint that on January 20, 1902, Honorable Henry C. Smith, senior judge of the district court of Lewis and Clark county, duly appointed a board of appraisers pursuant to the provisions of section 3698 of the Political Code and amendments thereto; that such board did fix the valuations upon plaintiff's real property; that the plaintiff presented to the county assessor a list of such property, showing a total actual valuation thereof of \$430,365, but notwithstanding this, the county assessor of Lewis and Clark county, without himself estimating the value of such property, affixed the valuations so determined upon by the board of appraisers at \$763,370; that plaintiff appeared before the board of equalization and sought a reduction of its assessment, but its application was denied, except as to a small portion thereof; that plaintiff has paid all taxes on its personal property for the year 1902, and tendered payment of the taxes upon its real property upon the valuation thereof as listed by the plaintiff, but that this tender was refused. It is then alleged that the county treasurer has advertised such real property for sale to pay the taxes assessed against the same upon the valuation made by the board of appraisers and listed by the assessor, as corrected by the board of equalization. To the complaint, which was verified positively, an answer was filed, verified upon information and belief, and upon these pleadings only the court heard the application for a temporary injunction, and made the order complained of. It is conceded that the answer had no evidentiary value.

A number of minor questions are suggested which need not be considered. The principal contention is embodied in the query: Was section 3698, Political Code, as amended by an act of the Fifth Legislative Assembly, approved March 3, 1897 (Session Laws of 1897, page 195), constitutional? (This section and section 3699 were repealed by an Act of the Eighth Legislative Assembly, approved February 6, 1903: Session Laws of 1903, page 1, chapter 1.) If this section was con-

stitutional, then there is no merit in plaintiff's contention; if not, then the injunction was properly granted.

Section 3698 above, as amended, among other things, provides: "That in all counties in the state of Montana which now have, or those which may hereafter acquire, a total assessment of eight million dollars or more, the judge of the district court, or if there be two judges in the district then the senior judge of said district court shall on or before the second Monday of February of each year, designate three reputable citizens who shall be residents and taxpayers in the county for which they are appointed, who shall constitute a board of appraisers whose duty it shall be to fix valuation of real estate in the county for the purpose of assessment by the county assessor, which valuation so fixed by said board of appraisers shall constitute the value or 'true value' of such real estate. * * * The assessor, in making up his assessment list of said estate, is hereby prohibited from assessing any greater or less value upon any piece of real estate than that so fixed by said board of appraisers. * * * It shall be the duty of the county assessor to attend the meeting of the board of appraisers and give such board all the information in his possession concerning property to be assessed and its valuation."

The contention of the plaintiff is that, as the Constitution (Article XVI, section 5) provides for the election of an assessor in every county, no other person than such assessor can fix the valuation of property for revenue purposes, and urges that this question was determined in *Mutual Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470. In the *Martien Case* this court construed that portion of section 5, Article XVI, above, which reads as follows: "There shall be elected in each county * * * one treasurer, who shall be collector of taxes"; and held that this language, when read in the light of section 29, Article III, of the Constitution, prohibited anyone else from being such collector. That case proceeded upon the theory that, as the Constitution had designated one particular officer as collector, or, in other words, had defined one duty of

the county treasurer, and as the Constitution expressly declares that its provisions are mandatory and prohibitory, unless by express terms they are declared to be otherwise, therefore no one else could lawfully act as collector of taxes. The language construed was clearly susceptible of no other interpretation. But has this decision any application here?

The provision of the Constitution relative to the office of assessor found in section 5, article XVI, above, is merely that there shall be elected in each county one assessor. That section provides: "There shall be elected in each county the following officers: One county clerk, who shall be clerk of the board of county commissioners and *ex-officio* recorder; one sheriff, one treasurer, who shall be collector of taxes; * * * one county superintendent of schools; one county surveyor; one assessor; one coroner; one public administrator. * * *"

It will be observed that there is no attempt to define all or any of the duties of any of these officers, except the county clerk and treasurer. Of the county clerk it is said, he shall be clerk of the board of county commissioners and *ex-officio* county recorder; and of the treasurer it is said, he shall be collector of taxes. The election of the members of the board of county commissioners is provided for in section 4 of Article XVI, and the election of the county attorney in section 19 of Article VIII. Section 15 of article XII provides that the board of county commissioners of each county shall constitute a county board of equalization, and further provides: "The duty of the county boards of equalization shall be to adjust and equalize the valuation of taxable property within their respective counties. Each board shall also perform such other duties as may be prescribed by law."

In the matter of legislation the people, through the legislature, have plenary power, except in so far as inhibited by the Constitution, and the person who denies the authority in any given instance must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the

power exercised. (Cooley's Constitutional Limitations, 200; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47.)

Does the mere enumeration of county officers prohibit the legislature from defining their duties? Of course, in so far as the Constitution has defined those duties, as in the instances mentioned—of the county clerk, treasurer, and board of equalization—the legislature may not enact any law in conflict therewith. So far as those duties are not prescribed by the Constitution, they may be by legislative enactment (*Territory v. Carson*, 7 Mont., at page 428, 16 Pac., at page 573), and in the Political Code the duties of the several county officers are particularly specified. If this is not so, this inquiry becomes pertinent: What are the duties of the sheriff, if those duties may not be defined by law? That office is created by the Constitution, but the duties appertaining thereto are in nowise mentioned. And the same inquiry is likewise applicable to the office of superintendent of schools, coroner, surveyor, public administrator, or assessor. The mere suggestion of the question demonstrates the confusion which would result from holding that these officers are entirely free from legislative control, or that the legislature may not prescribe the duties required of them, within the limitation that it may not entirely denude an office created by the Constitution of its functions and leave an office in name only.

But may the legislature create new county offices and devolve upon them duties respecting the management or control of county affairs? Section 6 of Article XVI of the Constitution provides: "The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require," etc. Acting under the provisions of this section, the offices of board of appraisers and county auditor were created and their respective duties defined. The office of board of appraisers was originally created by an Act of the Second Legislative Assembly, approved March 6, 1891 (Session Laws of

1891, page 73), and the chairman of the board of county commissioners, the assessor, and one third person composed the board. This Act was amended by an Act of the Third Legislative Assembly, approved February 24, 1893 (Session Laws of 1893, page 64), and the effect of the amendment was to make the board consist of three persons appointed by the district judge. The provisions of this last Act were carried forward into the Political Code as sections 3698 and 3699. The amendment made by the Fifth Legislative Assembly is immaterial so far as this case is concerned. Nor is the assessor denied any participation in the fixing of the values of real estate; on the contrary, it will be observed that by express terms he is required to attend the meeting of the board of appraisers and to give his opinion as to the value of the real estate to be appraised.

If the contention of the plaintiff prevails, no one else but the assessor can fix the valuation to the property in controversy, and the only legitimate inference from this is that his appraisal must be conclusive. But such a contention is distinctly antagonistic to section 15, Article XII, of the Constitution, which makes the board of equalization a supervisory body with authority to raise or lower any valuation placed upon a particular piece of property by the assessor. So that there cannot be any merit in the claim that a taxpayer has the right to have his property taxed upon the valuation made by the assessor.

But, furthermore, section 16 of Article XII of the Constitution provides: "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships and school districts."

We might be somewhat confused as to the meaning of the phrase "in the manner prescribed by law," except for the interpretation placed thereon by the same section. By the first sentence of this section the legislature is left free to prescribe the manner in which property shall be assessed, except so far as the Constitution has prescribed such manner. And what is the exception? That "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization." The manner, then, includes the agency which shall make the assessment; for the above excepting clause has no reference to the last portion of the section, which only refers to the division or apportionment of the assessment after the same is made, and can only refer to the agency employed, which in that clause is the state board of equalization.

We are satisfied, in view of these provisions of our Constitution, that the legislature was acting within its authority in creating the board of appraisers, and, in clothing such board with authority to fix the valuation upon real property in the first instance, it did not contravene any provision of the Constitution.

We think the enactment of the statute a valid exercise of legislative power, and that the district court erred in holding to the contrary. The order granting the injunction is reversed, and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

Rehearing denied, July 29, 1905.

32	442
33	461
34	248
34	461

32	442
35	19
35	22
35	90

32	442
41	590

STATE OF MONTANA, RESPONDENT, v. JONES, APPELLANT.

(No. 2,099.)

(Submitted May 1, 1905. Decided May 29, 1905.)

Criminal Law—Rape—Information—Sufficiency—Charging Several Offenses—Jurors—Challenges—Burden of Proof—Statutory Provisions—Motion to Discharge Jury—Sustaining Challenge—Exceptions—Evidence—Previous Good Character of Defendant—Question for Jury—Weight of Evidence—Credibility of Witnesses—Conflicting Instructions—Sufficiency of Evidence—New Trial—Newly Discovered Evidence—Sufficiency—Judicial Discretion.

Rape—Information.

1. In an information charging defendant with rape of a female under the age of sixteen years, the phrase "to wit, of the age of fourteen years and upwards," while it might have been omitted, was not confusing as to the meaning of the language employed.

Rape—Information—Surplusage—Presumptions.

2. In an information charging rape of a female under sixteen years of age, the words "against the consent of said" prosecutrix, are merely surplusage, the law presuming that such a child is incapable of giving consent, and but one offense is charged.

Criminal Law—Jury—Challenge—Burden of Proof.

3. In a criminal prosecution the burden of proof on the trial of a challenge to the array was on the defendant interposing it.

Criminal Law—Challenge to Panel—Evidence.

4. Penal Code, section 2038, provides that, where a challenge to the panel is denied, the court must proceed to try the question of fact. *Held*, that where defendant's offer to submit such a challenge on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied.

Criminal Law—Jurors—Implied Bias—Challenges—Exceptions.

5. Under Penal Code, section 2170, an exception is allowed to the action of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias.

Rape—Previous Good Character of Defendant—Presumptions.

6. In prosecutions for rape, evidence of previous good character of defendant is never conclusive, as a matter of law, in favor of defendant, and does not of itself raise a presumption in his favor.

Rape—Previous Good Character of Defendant—Purpose.

7. In a prosecution for rape, evidence of defendant's previous good character is evidence which the jury should consider, together with all the other evidence in the case in determining whether or not the accused is guilty beyond a reasonable doubt.

Rape—Erroneous Instruction—Previous Good Character of Defendant.

8. In a prosecution for rape, to instruct that evidence of previous good character is conclusive in favor of defendant, and that it raises a presumption in his favor, is for the court to invade the province of the jury, and determine the weight or effect to be given to particular evidence.

Rape—Previous Good Character of Defendant—Correct Instruction.

9. In a prosecution for rape, an instruction that if, from a consideration of the evidence, the jury believed defendant guilty beyond a reasonable doubt, they should so declare, notwithstanding they might be satisfied that prior to committing the offense of which he was accused defendant was a man of good reputation and character, was correct.

Criminal Law—Conflicting Instructions—Harmless Error—When.

10. Where, in a criminal prosecution, an instruction correctly stating the law is in conflict with an erroneous one in defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two.

Instructions—Witnesses—Calling Attention to Particular Testimony.

11. An instruction calling attention to the testimony of one particular witness, singling her out from the other witnesses, is erroneous.

Jurors—Witnesses—Credibility—Appeal—Evidence.

12. The jurors are the judges of the credibility of witnesses and of the weight to be given the testimony, and the supreme court, on appeal from judgment of conviction for the crime of rape, may not weigh the evidence and say that it does not prove that which it intends to prove, or that particular evidence does prove particular facts.

Rape—Testimony of Prosecutrix—When Sufficient to Convict.

13. In a prosecution for rape, where the jury believe the testimony of prosecutrix, no additional evidence is necessary to support a verdict of guilty.

Rape—New Trial—Newly Discovered Evidence—Insufficiency.

14. In a prosecution for rape, newly discovered evidence examined, and held insufficient to warrant a new trial.

New Trial—Newly Discovered Evidence—Cumulative.

15. To entitle defendant, convicted of the crime of rape, to a new trial on the ground of newly discovered evidence, it must appear, among other things, that the new evidence be not cumulative merely.

New Trial—District Courts—Discretion.

16. An application for a new trial is addressed to the sound legal discretion of the trial court.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

A. O. JONES was convicted of rape, and appeals. Affirmed.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

Defendant was convicted of the crime of rape, and appeals from the judgment and the order of the district court refusing his motion for a new trial.

The charging part of the information is as follows: "That the said A. O. Jones, on or about the 10th day of September, 1902, in the city of Bozeman, county of Gallatin, state of Montana, did willfully, unlawfully and feloniously have sexual intercourse with, and carnal knowledge of, one Louise Boismier, a female child under the age of sixteen years, to wit, of the age of fourteen years and upwards, against the consent of said Louise Boismier; said Louise Boismier not being the wife of said A. O. Jones," etc. To this information a demurrer was filed, which was overruled. At the April term of court, 1903, when this cause was called, the defendant interposed a challenge to the panel of jurors, but this was disallowed, and a continuance had until the October term, when a challenge upon substantially the same grounds as made at the April term was again made and overruled. After all peremptory challenges had been exhausted, one James M. Robertson was called to the jury-box, and upon examination upon his *voir dire* was challenged by the state for implied bias, and this challenge was by the court sustained.

Among other instructions given were Nos. 13 and 14, which read as follows:

"No. 13. You are instructed that in doubtful cases evidence of good character is conclusive in favor of the party accused; and if, from the evidence, you find that the facts and circumstances proved and relied upon to establish the defendant's guilt are in doubt, or if the defendant has, by the evidence, satisfied you that he was a man of good character up to the time of the alleged offense in this case, the presumption of law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption and acquit him.

"No. 14. If the jury believe from the evidence beyond a reasonable doubt that the defendant committed the crime in

question, as charged in the information, it will be their sworn duty as jurors to find the defendant guilty, even though the evidence may satisfy their minds that the defendant, previous to the commission of the alleged crime, had sustained a good reputation and character for being a law-abiding and peaceable citizen."

The jury returned a verdict of guilty, and the defendant was sentenced to serve five years in the penitentiary. A motion for a new trial was made on a statement specifying the errors relied upon, and also upon affidavits of newly discovered evidence. The motion was denied, and these appeals are prosecuted.

Messrs. Hartman & Hartman, and Mr. John A. Luce, for Appellant.

The information did not substantially conform to the requirements of section 1832, in that it did not contain a statement of the facts constituting the offense charged in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended. Second, that it did not substantially conform to the requirements of section 1834, in that it is not direct and certain as it regards the particular circumstances of the offense charged, in that it is uncertain whether the offense charged is intended to be charged as committed upon a female under the age of sixteen years, or upon a female who resists and her resistance is overcome by violence or force. Third, that two offenses were charged, one the offense committed with a female under the age of sixteen years and the other upon a woman who resists and her resistance overcome by violence or force. And the fourth ground of the demurrer was that a public offense was not stated. The allegation that Jones willfully, unlawfully and feloniously did have sexual intercourse and carnal knowledge of this girl against her consent is equivalent to the allegation that the act was committed forcibly and against her will. (17 Ency. of Pl. & Pr. 658.)

Where the indictment alleges that the act was done against the will of the female, the prosecution gives notice by said allegation that it takes upon itself the proof of that fact. (*State v. Gaul*, 50 Conn. 578; *Vasser v. State*, 55 Ala. 264.)

The allegation that the act was feloniously done against the consent of the girl implies and carries with it the idea of the use of force and that she resisted and her resistance was overcome; or the phrase might mean that she was at the time unconscious of the nature of the act; therefore the offense might be one defined by the fifth subdivision of section 450 of the Penal Code, or it might imply that she was prevented from resisting by some intoxicating, narcotic or other anesthetic substance administered by or with the privity of the accused, this being the offense charged under the fourth subdivision of the section; or it might mean that she was incapable, from any of the causes mentioned in subdivision 2, of giving legal consent. The charge "against her consent" is uncertain in its meaning and the demurrer should have been sustained. This court considered, without deciding, the point in *State v. Mahoney*, 24 Mont. 282, 61 Pac. 647, where Justice Piggott held that the objection should have been made by demurrer in the district court and before pleading. (See pages 284, 285 of the opinion; Bishop's New Criminal Procedure, vol. 1, secs. 517-519; *State v. Vorey*, 41 Minn. 134, 43 N. W. 324; *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325-327; *State v. Henn*, 30 Minn. 464, 40 N. W. 564; *Wendell v. State*, 46 Neb. 824, 65 N. W. 884; *Knopf v. State*, 84 Ind. 316; *Commonwealth v. Symonds*, 2 Mass. 163; *Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709; *State v. Smith*, 61 Me. 386; *State v. Gaston*, 96 Iowa, 505, 65 N. W. 415; *State v. Mahoney*, 24 Mont. 282-284, 61 Pac. 647; *People v. Garcia*, 58 Cal. 102; *People v. Nelson*, 58 Cal. 104, opin. 107.)

The court erred in sustaining the challenge of the state to the juror, James M. Robertson. The challenge was no challenge at all for cause. It read as follows: "I challenge the

juror on the ground of implied bias." This was in no sense a challenge for implied bias and was totally insufficient in that no one of the grounds as provided for in section 2049 of the Penal Code was assigned. (Penal Code, sec. 2051; *State v. Simas*, 62 Pac. 242, opin. 246; *People v. Cotta*, 29 Cal. 166; *Hopt v. Utah*, 120 U. S. 430, 433, 434, 436; *Paige v. O'Neil*, 12 Cal. 483; *People v. Hardin*, 37 Cal. 258; *People v. Dick*, 37 Cal. 277.) The effect of the erroneous decision of the court in allowing this challenge for implied bias was to give the state an additional peremptory challenge. And under no circumstances can the number of peremptory challenges allowed the state be increased. (*Hill v. State*, 10 Tex. App. 618; *Mahan v. State*, 10 Ohio, 233; *Stratton v. People*, 5 Colo. 276, 279, 280.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Second Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court:

1. The Information.—The information charges the defendant with the crime of rape committed upon a female child under the age of sixteen years. The phrase, "to wit, of the age of fourteen years and upward," modifies the former allegation to the extent of saying that, while the child was under the age of sixteen years, she was above the age of fourteen years. The phrase might have been omitted, but its use could not have the effect of confusing anyone as to the meaning of the language employed. (*People v. Mills*, 17 Cal. 276.) Having charged that the crime was committed upon a female child under the age of sixteen years, the words "against the consent of said Louise Boismier" are merely surplusage; for the law presumes that such a child is incapable of giving consent. (*State v. Woods*, 49 Kan. 237, 30 Pac. 520; *Davis v. State*, 42 Tex. 226; *People v. Verdegreen*, 106 Cal. 211, 46 Am. St. Rep. 234, 39 Pac. 607.) In *People v. Ten Elshop*, 92 Mich. 171, 52 N. W. 298, it is said: "The law conclusively presumes

that the female, being within the age fixed by the statute, is incapable of consent, and therefore the act is by force and arms." We are therefore of the opinion that the information is sufficient, and that it charges but one offense.

2. Challenge to the Array.—The record discloses that at the April term of court, 1903, a challenge to the jury panel was interposed by counsel for the defendant in this case upon the ground that the list of names of men for jury service for the year 1903 had not been drawn in the manner provided by law, and that a large number of names of men qualified for such service had been omitted. This challenge was denied, and the issues raised were tried by the court, and the challenge overruled. The trial of the case of *State v. Jones* was afterward continued until the October term of court, when a challenge to the panel upon substantially the same grounds as made at the April term was again interposed, and counsel for defendant asked "to submit the question to the court upon the same testimony heretofore submitted to the court." This evidently had reference to the testimony submitted at the April term of court. The county attorney objected to the challenge upon the ground that it was made too late, and that the jury had already been sworn; but this objection was by the court overruled, whereupon counsel for the defendant said: "We withdraw the request to submit it on the former testimony, and ask the challenge to be passed upon by the court." After some colloquy between the court and counsel, the county attorney said: "And now we deny the facts set forth in the challenge, and we deny the challenge. The Court: I am now ready to hear any testimony in regard to the matter, if it is necessary to hear it to determine the matter. Defendant's Counsel: On behalf of the defendant, A. O. Jones, I now insist on the request to totally discharge the panel, so far as the defendant in this case is concerned, on the ground that the court has already sustained the challenge, as it appears from the record, and overruled the exception, and there is nothing more to try, and the jury should be discharged." This request was by the

court denied, and exception saved. There is nothing in the record whatever to show that the court had in fact sustained the challenge, but, on the contrary, the record does show that after the challenge was denied, as provided in section 2038 of the Penal Code, the court announced itself ready to hear testimony, and to try the question of fact raised, as provided by that section.

Upon the trial of the challenge the burden of proof was upon the defendant, who interposed the challenge, and the record fails to show that any evidence whatever was offered. The offer to submit the testimony taken at the April term had been withdrawn, and there was in fact nothing whatever before the court, and the request to discharge the jury was therefore properly denied. (*State v. Bowser*, 21 Mont. 139, 53 Pac. 179.) However, the bill of exceptions embraces the proceedings had with reference to the challenge made at the April term of court, and, if counsel for the defendant were misled by thinking that the court was actually passing upon the matter upon the evidence taken at the April term, it is sufficient to say that we are satisfied that the court was right in that instance in overruling the challenge, as the record fails to show any such abuse of power on the part of the jury commissioners as would vitiate the jury list. At most, it showed a mere irregularity.

3. Juror Robertson.—After the peremptory challenges were all exhausted, James M. Robertson was called as a talesman, and examined upon his *voir dire*; and at the conclusion of such examination the county attorney challenged the juror for implied bias. To this challenge the defendant said: "We resist the challenge on the ground that the juror has not only shown that he has not any implied bias, but that he is entirely impartial in the case, and states what is the fact." It will be observed that no objection was made to the particular form of the challenge, but that the matter was submitted to the court upon its merits. The court sustained the challenge, and the defendant excepted.

Section 2170 of the Penal Code provides: "On the trial of an indictment or information exceptions may be taken by the defendant to a decision of the court—(1) in *disallowing* a challenge to the panel of the jury, or to an individual juror for implied bias." From this it will be observed that an exception is allowed to the ruling of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias.

In *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132, this court quoted with approval language of the supreme court of the United States in *Hayes v. Missouri*, 120 U. S. 71, 7 Sup. Ct. 352, 30 L. Ed. 578, as follows: "The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. The right to challenge is the right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."

In *Thompson and Merriam on Juries*, section 251, it is said: "Where a statute provides simply that an exception may be taken to the decision of the trial court in *disallowing* a challenge, no exception lies to the action of the court in *allowing* a challenge. The reason is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn in the case, the purpose of the law has been accomplished. Neither party can be said to have a vested interest in any juror. Therefore although, in impaneling a jury, one competent person has been rejected, yet, if another equally competent has been substituted in his stead, no injury has been done."

4. Numerous errors are predicated upon the rulings of the court in admitting and excluding evidence. No useful purpose would be served in discussing these in detail. Suffice it to say that we have examined them at length, and are satisfied that no errors were committed prejudicial to the defendant.

5. Instructions 13 and 14.—Instruction No. 13 is wholly erroneous. While it may be that an instruction somewhat analogous, found in Sackett's Instructions to Juries, page 262, has found favor with some courts, though no authority whatever is cited in its support, we would not be willing to approve the instruction as therein given; while No. 13 above omits a portion of Sackett's instruction, rendering it much more objectionable than the one given by that author. It is erroneous in that it says that in certain cases evidence of previous good character is conclusive in favor of the accused, and again in saying that such evidence raises a presumption in favor of the accused; for it is never conclusive as a matter of law, and does not of itself raise a presumption in favor of the defendant. It is nothing more nor less than evidence, which the jury should consider together with all the other evidence in the case in determining whether or not the accused is guilty beyond a reasonable doubt. To say that evidence of previous good character is either conclusive or raises a presumption in defendant's favor, is for the court to invade the province of the jury, and determine the weight or effect to be given to particular evidence; and this the court should not do. (*State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.)

In our judgment, instruction No. 14 correctly states the law. In substance it was approved in *Hirschman v. People*, 101 Ill. 568. By this instruction the jurors were told that if, from a consideration of the evidence, they believed the defendant guilty beyond a reasonable doubt, then they should so declare, notwithstanding they may be satisfied that prior to the commission of the offense of which he was accused he was a man of good reputation and character. In other words, the evidence—which means all the evidence in the case, and which includes evidence of previous good character—is to be considered, and if it all, taken together, convinces the jury of the

defendant's guilt beyond a reasonable doubt, the mere fact that he was theretofore a man of good character will not excuse his offense. An instruction similar to No. 14, above, when given in connection with another instruction which erroneously limited the effect of evidence of previous good character, is criticised by the supreme court of Utah in *State v. Van Kuran*, 25 Utah, 8, 69 Pac. 60; but the decision rests upon the erroneous instruction given and proper instructions which were refused, rather than upon the giving of the instruction corresponding to No. 14, above. We think instruction No. 14 correctly states the law, and could hardly be misunderstood by the jury.

It is said that instructions 13 and 14 are radically conflicting; and so they are. By 13, if the jury found from the evidence that the defendant was previously a man of good character, that raised a presumption in his favor which entitled him to an acquittal; while in 14 the jury was instructed that, even though they believed the defendant had previously been a man of good character, still they might convict him. But does this conflict necessitate a reversal? While 13 is clearly erroneous, the errors are in defendant's favor, not to his prejudice. That instruction announces to the jury that if the case was, by the jury, considered doubtful, the evidence of defendant's previous good character, whether believed by the jury or not, should be deemed conclusive in his favor, leaving to the jury only the question: Is the case a doubtful one? Then it further says that, if the jury is satisfied from the evidence that the defendant theretofore was a man of good character, that fact raised a presumption in his favor. Either of these propositions is grossly erroneous, but each is in defendant's favor.

It is not every case of conflicting instructions which warrants a reversal. If one instruction states the law, and another one in conflict with it is given, which is erroneous, but in the defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two. The reason for this is apparent, and is illustrated in this instance; for, if the jury

followed the law as announced in No. 14, the defendant could not complain, for it states the law correctly. If, on the other hand, the jury ignored No. 14 and followed No. 13, defendant cannot complain, for in that event the jury could only be misled in his favor. (*St. Joseph etc. R. Co. v. Grover*, 11 Kan. 302; *Lobdell v. Hall*, 3 Nev. 507; *Robinson v. Mills*, 25 Mont. at page 406, 65 Pac. 119; *Thornton-Thomas Mer. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10.)

Instruction No. 9, given by the court, is likewise erroneous, but the error is also in defendant's favor.

6. Error is predicated upon the refusal of the court to give instructions Nos. 2, 3, and 5, asked by the defendant. No. 2 omits the word "material" before the word "fact"; No. 3 omits "reasonable" before the word "doubt"; and No. 5 calls the attention of the jury to the testimony of one particular witness, singling her out from the other witnesses who testified. (*Wastl v. Montana Union Ry. Co.*, 17 Mont. 213, 42 Pac. 772; *Hamilton v. Great Falls S. R. Co.*, 17 Mont. 334, 343, 42 Pac. 860, 863.) In the respects indicated, the instructions offered were erroneous, and the court did not err in refusing them

7. It is said that the verdict is contrary to the law as announced in several of the instructions given. But in discussing this alleged error we are, in effect, asked to weigh the evidence, and say that it does not prove that which it tends to prove, or that particular evidence does prove particular facts. This we may not do. The jurors were the judges of the credibility of the witnesses and of the weight to be given to the testimony.

8. It is earnestly claimed that the evidence is insufficient to support the verdict. We have considered it at length, but are unable to agree with counsel for appellant. Aside from the direct testimony of the prosecuting witness, there are numerous facts and circumstances which tend to support her version of the affair. If the jury believed her testimony, we are not pre-

pared to say that any additional evidence was required. (*State v. Peres*, 27 Mont. 358, 71 Pac. 162.) But the jury was doubtless impressed by the fact that the defendant was assisting in getting the prosecutrix away from Gallatin county; that when she first accused him, and a meeting was arranged for a particular time and place where the defendant might confront her, he insisted in having a conversation with her alone before the question of his guilt or innocence should be discussed before the members of the family. There is also evidence that he desired to have the girl taken to Butte, and have her child left there when it should be born. Other facts and circumstances might be given, as disclosed by the record—facts and circumstances quite inconsistent with the innocence of the accused—which have some evidentiary value, however small, and which doubtless weighed with the jury in determining the question of appellant's guilt.

9. A new trial was also asked upon the ground of newly discovered evidence. The affidavits setting forth the newly discovered evidence were made by former schoolmates of the prosecuting witness, and detail conversations alleged to have been had with her, and describe acts of loose and lascivious conduct on the part of the prosecuting witness toward her schoolmates. With one exception, every one of these affidavits mentions Wilson Riddle as one of the schoolmates referred to, and he was a witness for the defendant, and testified to statements made to him by the prosecuting witness similar to the statements contained in the affidavits, and the testimony of Wilson Riddle was contradicted by the prosecuting witness at the trial. In *State v. Brooks*, 23 Mont. at page 161, 57 Pac. 1043, this court quoted with approval the following language from *People v. Demasters*, 109 Cal. 607, 42 Pac. 236: "We can see no abuse of discretion on the part of the court below in denying defendant's motion for a new trial, made upon the ground of newly discovered evidence. As has been repeatedly held by this court, a motion for a new trial is addressed to the sound

legal discretion of the trial court; and the action of the latter will not be disturbed except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust. (*Hobler v. Cole*, 49 Cal. 250; *Arnold v. Skaggs*, 35 Cal. 684.) To entitle the plaintiff to a new trial on this ground, it must appear, among other things, that the new evidence be not cumulative merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that the evidence could not with reasonable diligence have been discovered and produced at the trial." Furthermore, the showing of due diligence is insufficient. In the recent case of *In re Colbert's Estate*, 31 Mont. —, 80 Pac. 248 (on rehearing), this court considered this question at length, and announced a rule which we unhesitatingly follow. A restatement in this case is not necessary. The application was addressed to the sound legal discretion of the trial court, and we do not discover any abuse of that discretion in the order overruling the motion.

After a consideration of all the alleged errors, we are unable to find any errors committed prejudicial to the defendant and appellant. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

Rehearing denied July 5, 1905.

32	456
34	290

32	456
137	374

CORNISH, RESPONDENT, v. WOOLVERTON ET AL., AP-
PELLANTS.

(No. 2,091.)

(Submitted March 24, 1905. Decided May 29, 1905.)

Bills and Notes—Negotiability—Assignment Without Indorsement—Non-negotiable Contracts—Mortgages—Record—Innocent Purchaser—Agency—Estoppel.

Bills and Notes—When Non-negotiable.

1. A note providing that if not paid when due, both principal and interest coupons shall bear an increased rate of interest, is non-negotiable.

Note Secured by Mortgage—When Non-negotiable.

2. Where a note is secured by a mortgage of even date with the note, and the mortgage provided that the mortgagor should pay the taxes and insurance, keep the property in repair, commit no waste, etc., and that in default of performance of any covenant the principal and interest should become due, and the mortgage be subject to foreclosure, at the option of the mortgagee, and that, if foreclosure proceedings were commenced, \$150 should be allowed as an attorney's fee, the note and mortgage are *held* to be parts of the same contract, under Civil Code, section 2207, which must be read and construed together, thus rendering the fulfillment of the entire contract uncertain and the note therefore non-negotiable.

Mortgages—Assignment.

3. A mortgage given to secure the payment of a note is but an incident, and passes to the assignee of the note.

Mortgages—Liens.

4. A mortgage does not convey the legal title to the property mortgaged, but is a mere lien to secure the performance of the contract to which it is incident.

Negotiable Instruments—Transfer Without Indorsement—Effect.

5. A transfer of a negotiable instrument, payable to order, without indorsement, destroys its negotiable character, and the assignee takes it subject to all defenses available against it in the hands of the payee.

Note Secured by Mortgage—Negotiability.

6. *Quaere*: Is a note, though negotiable in form, non-negotiable when secured by a mortgage, without regard to whether it contains any reference to the mortgage or any conditions contained therein?

Non-negotiable Contracts—Assignment—Notice—Payment to Assignor.

7. Under Code of Civil Procedure, section 571, where the maker of a non-negotiable contract made for the payment of money or personal property, pays the assignor the debt or obligation without notice of an assignment of such contract, and in good faith, and takes an acquittance, such payment constitutes a complete defense to an action by the assignee.

Mortgage—Conveyance.

8. A mortgage is a conveyance within the meaning of Civil Code, sections 1640, 1641 and 1642, though of a chattel interest only.

Mortgage—Assignment a Nullity.

9. The assignment of a mortgage, independent of the debt, is a nullity.

Mortgage—Evidence of Debt—When.

10. In the absence of any written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment.

Mortgage—Assignment—Record—Notice.

11. Under Civil Code, sections 1640 and 3823, the record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured.

Mortgage—Assignment—Notice—Purchaser for Value.

12. Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, who executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a purchaser for value free from encumbrances.

Mortgage—Interest—Collection—Agency.

13. The mere fact that a person acted as the agent of the owner of a mortgage in collecting interest and delivering the canceled coupons, is not sufficient to show authority to collect the principal and discharge the mortgage.

Mortgage—Collection Agent—Duty to Ascertain Authority.

14. One paying a debt secured by mortgage to a supposed agent of the owner of the mortgage is bound to ascertain the scope of the agent's authority, otherwise he assumes the risk incident to such failure to make inquiry.

Mortgage—Assignment—Record—Estoppel.

15. Where an assignee of a mortgage recorded the assignment, and a purchaser of the mortgaged premises afterward paid the debt to the assignor, failure of the assignee to make claim to the ownership of the mortgage until two years after the assignment, and after the assignor had become insolvent, was not sufficient to estop the assignee from enforcing the security, nothing appearing to show that he failed to speak when he should, or that he actively or passively misled the defendants to their prejudice.

Appeal from District Court, Gallatin County; Frank Henry, Judge.

ACTION by William Cornish against William W. Woolverton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Messrs. Bolinger & Stewart and Messrs. Hartman & Hartman, for Appellants.

The paper in suit is non-negotiable because it provides that if not paid when due, both principal and interest shall bear an increased rate of interest. (*Stadler v. Bank*, 22 Mont. 190, 200-206, 74 Am. St. Rep. 582, 56 Pac. 111; *Hegler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393; *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53; *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946.)

The note is non-negotiable for the further reason that it refers upon its face to the mortgage securing it of even date, and thereby makes the mortgage a part of the note requiring both to be construed together as one instrument, so that if there be any provision in the mortgage, which, if written upon the face of the note would render it non-negotiable, the note is thereby rendered non-negotiable. (*Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; *Daniel on Negotiable Instruments*, secs. 156, 835; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779; *Muzzy v. Knight*, 8 Kan. 456; 1 *Jones on Mortgages*, sec. 71; *Strong v. Jackson*, 123 Mass. 60, 63, 64, 25 Am. Rep. 19; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Garnet v. Myers* (Neb.), 94 N. W. 803.)

The note is non-negotiable for the further reason that there is no allegation in the complaint that it was ever indorsed, simply that it was assigned with the mortgage, and where a note, even otherwise negotiable, has been assigned without indorsement, it alters its negotiable characteristics and features and makes it a non-negotiable instrument in the hands of the assignee. (*McCrum v. Corbey*, 11 Kan. 464; *Harrison National Bank v. Pease*, 8 Kan. App. 573, 54 Pac. 1038; *Foreman v. Beckwith*, 73 Ind. 515; *Seymour & Co. v. Layman*, 10 Ohio St. 283; *Sathre v. Rolfe* (Mont.), 77 Pac. 431, 433.) An indorsement made subsequent to the transfer or assignment cannot restore the negotiability of the paper which has been destroyed by the assignment without indorsement. (*Goshen Bank v. Bingham*, 118 N. Y. 349, 16 Am. St. Rep. 765, 23 N. E. 181; *Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70;

Clark v. Whittaker, 50 N. H. 474, 9 Am. Rep. 286; *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452; *Pavey v. Stauffer*, 45 La. 353, 12 South. 512, 19 L. R. A. 716.)

The note is also non-negotiable for the further reason that it is secured by a mortgage, and under the laws of Montana the holder of a note secured by mortgage must first exhaust his mortgage security before he may bring suit upon the paper against any party to the note, thus making impossible one of the essential requisites of negotiable paper, viz.: That the holder in due course may hold personally responsible and collect by an action at law the sum due on the paper from any party thereto. Under our statute and the authorities construing it this cannot be done, as the holder of the paper must foreclose the mortgage and exhaust the security, and should he bring suit upon the note direct, ignoring his security, that fact would be a complete defense to a suit on the note. (Code of Civil Proc., sec. 1290; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Chicago T. & I. Co. v. O'Marr*, 18 Mont. 568, 587, 46 Pac. 809, 47 Pac. 4; *Hibernia Sav. & Loan Assn. v. Thornton*, 127 Cal. 575, 60 Pac. 37; *Strong v. Jackson*, 123 Mass. 60, 63, 64, 25 Am. Rep. 19; *Donaldson v. Grant* (Utah), 49 Pac. 779.)

Until notice of the assignment of the paper was given to appellants, or some of them, all defenses in favor of them or either of them and against the Bunnell & Eno Investment Company which might have been asserted against the assignor of the paper, had it brought suit, may be asserted against the assignee. (*Stadler v. First National Bank*, 22 Mont. 190, 211, 213, 74 Am. St. Rep. 582, 56 Pac. 111; *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 101; 2 Current Law, pp. 923, 924, and cases cited; *Bank of Stockton v. Jones*, 65 Cal. 437, 438, 4 Pac. 418; *Meier v. Hess*, 23 Or. 599, 32 Pac. 755, 756; *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Foster v. Carrson*, 159 Pa. St. 477, 39 Am. St. Rep. 696, 28 Atl. 356; *Vann*

v. *Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70, 14 South. 273, 23 L. R. A. 325, 330, 331; *Goodale v. Patterson*, 51 Mich. 532, 16 N. W. 890; *Van Buskirk v. Insurance Co.*, 14 Conn. 141, 36 Am. Dec. 473; *Van Keuren v. Corkins*, 66 N. Y. 77; *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272; *Greene v. Warnick*, 64 N. Y. 220; *Sykes v. Citizens' National Bank* (Kan.), 76 Pac. 393.)

Recordation of the assignment of the mortgage in suit was not notice to appellants, or either of them so as to invalidate the payment made in good faith to the original mortgagee. (*Jackson v. Van Valkenburg*, 8 Cow. 260; *Foster v. Carson*, 159 Pa. St. 477, 39 Am. St. Rep. 696, 28 Atl. 356; *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975, 976; *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799, 800; *Hull v. Diehl*, 21 Mont. 71, 78, 80, 52 Pac. 782; *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609, 611, 612; *James v. Morey*, 2 Cow. 246-288, 14 Am. Dec. 475; *Crane v. Turner*, 67 N. Y. 437; *Van Keuren v. Corkins*, 66 N. Y. 220; *Green v. Warnick*, 64 N. Y. 220; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 275, 68 N. W. 101.) Recording statutes are harsh and should be strictly construed with reference to the notice they give and the effect which they have. (*Reeves v. Hayes*, 95 Ind. 521; *Crane v. Turner*, 68 N. Y. 437; *Coll v. Hastings*, 3 Cal. 179; *Chamberlain v. Belle*, 7 Cal. 293, 68 Am. Dec. 260; *Bird v. Dennison*, 7 Cal. 291, 308.)

Ostensible authority, which is such as the principal unintentionally or by want of ordinary care causes or allows a third person to believe another to possess, is sufficient to validate any dealing with such other by the third person, and the respondent is bound by the payment to the Bunnell & Eno Investment Co., if he clothed it with such ostensible authority. (*Prescott v. Brooks* (N. D.), 94 N. W. 88, 91; Civil Code, secs. 3073, 3092, 3093, 3110, 3114, 3116; Cal. Civil Code, 2317; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762; *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213; *General etc. Am. v. Torkelson*, 73 Minn. 401, 76 N. W. 215; *Bailey v.*

Anderson, 75 Minn. 49, 77 N. W. 414; *Lynn v. Hanson*, 75 Minn. 346, 77 N. W. 976; *Sykes v. Bank* (Kan.), 76 Pac. 393; *Brek v. Meeker* (Neb.), 93 N. W. 993; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36.) Respondent is estopped from collecting the paper. (Civil Code, sec. 4634; *Prescott v. Brooks* (N. D.), 94 N. W. 88, 91; *Union College v. Wheeler*, 61 N. Y. 88, 111; *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609, 610; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 101; *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452, 453; *Brek v. Meeker* (Neb.), 93 N. W. 993; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36.)

Mr. John A. Luce, for Respondent.

Payment to the original mortgagee or his agent does not discharge the mortgage, even though the assignment of the mortgage is not of record at the time of the payment. (*Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, 31, 32; *Rogers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Mutual Benefit Life Ins. Co. v. Huntington*, 57 Kan. 744, 48 Pac. 19; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 8; *Mobley v. Ryan*, 14 Ill. 51, 56 Am. Dec. 488; *Ennor v. Hodson*, 134 Ill. 32, 25 N. E. 582, 583; *Snell v. Margritz* (Neb.), 91 N. W. 274; *Cowing v. Cloud*, 16 Colo. 326, 65 Pac. 417-420; *Paris v. Moe*, 60 Ga. 90.)

The fact that a note is to draw greater interest after default does not discharge the negotiable quality of the paper. (*Parker v. Plymell*, 23 Kan. 403; *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603; *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567; *Clark v. Skeene*, 61 Kan. 526, 78 Am. St. Rep. 337, 49 L. R. A. 190, 191; *Robinson Female Seminary v. Campbell*, 60 Kan. 60, 55 Pac. 276; *Hollingshead v. Globe Investment Co.*, 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659, 661, and cases cited.)

"Authority to collect interest confers no authority to collect the principal." (7 Ency. 1032, note 61, and cases cited;

Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; *Ilgensfritz v. Newark Mut. Ben. L. Ins. Co.*, 81 Fed. 27; *Smith v. Kidd*, 68 N. Y. 130, 137, 23 Am. Rep. 157; *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423; *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Williams v. Walker*, 2 Sand. Ch. 325.)

Any form which manifests an intention to transfer a negotiable promissory note is sufficient to constitute an indorsement. (*Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Heard v. Dubuque City Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Rowe v. Haines*, 15 Ind. 445, 77 Am. Dec. 101.)

The recording of an assignment is notice that the mortgagee can no longer deal with the mortgaged interest, and that a subsequent discharge or release of the mortgage executed by the mortgagee is invalid. (*Belden v. Meeker*, 47 N. Y. 307, 312, 313; 1 Jones on Mortgages, 472, citations 474 and 475; *Decker v. Boice*, 83 N. Y. 215.)

"The recording of an assignment of a mortgage is part of the chain of title of which the party must take notice." (*Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 8; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532.)

No estoppel could exist under the authorities. (*Biddle Boggs v. Merced Min. Co.*, 14 Cal. 368; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 53, 28 Pac. 116; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *Plum v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392, 72 Am. Dec. 526; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 774.) There was no fraud; no turpitude; no misrepresentations; no admissions.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to foreclose a mortgage executed on August 1, 1895, to secure a promissory note for borrowed money, by the de-

defendants William W. Woolverton and his wife, Joanna Woolverton, to the Bunnell and Eno Investment Company, a New Jersey corporation (hereinafter referred to as "the company").

The plaintiff sues as the purchaser for value of the mortgage and note prior to maturity, evidenced by written assignment to him by the company, duly acknowledged, and recorded in Gallatin county on September 28, 1895. The complaint is in the ordinary form, alleging a breach of the contract by a failure to pay the note according to its terms, and asks for a decree of sale of the mortgaged property for the satisfaction of the indebtedness, with interest and costs, including attorney's fees. Copies of the mortgage and note are attached. The following is a copy of the note:

"On the first day of August A. D. 1900, for value received I promise to pay to the order of The Bunnell and Eno Investment Company, the principal sum of Fifteen Hundred Dollars, with interest thereon at the rate of six per cent per annum from August 1, 1895, until maturity, payable semi-annually, according to the tenor of ten interest notes, each for Forty-five Dollars, bearing even date herewith and hereto attached, both principal and interest notes payable in gold coin of the United States of America of or equal to, the present standard of weight and fineness at the Merchants' National Bank in Helena, Montana. This note and these coupons are to draw interest at the rate of twelve per cent per annum after maturity and are secured by mortgage of even date herewith, duly recorded in Gallatin county, of the State of Montana.

"Dated at Helena, State of Montana, on the first day of August, 1895."

The defendants answered, setting up four separate defenses. The first of these it will not be necessary to notice further than to observe that it contains a general plea of payment of the full amount of the note and interest, and a release of the mortgage of record by the company on or about February 26, 1900, and deraignment of title to the defendant Metheny from Woolverton and wife, through Kirk, by deeds of warranty.

The second defense alleges, in substance, that on February 25, 1897, the defendants William W. Woolverton and Joanna, his wife, conveyed the mortgaged property to defendant Ira L. Kirk; that he was at the time of his purchase informed of the encumbrance thereon in favor of the company, and agreed to assume and pay it off as a part of the purchase price; that up to the date of this sale the defendants Woolverton had paid to the company all the interest which had fallen due, and had received the coupons therefor from the company, properly canceled; that after his purchase defendant Kirk had paid to the company all the other installments falling due; that a short time before the principal of the note fell due the said Kirk paid it in full, with interest up to the date of maturity, and received from the company a written release and acknowledgment of satisfaction in full, duly acknowledged for record, and had the same recorded in the records of Gallatin county; that none of the defendants received notice that the plaintiff owned or claimed to own the note and mortgage until May 12, 1902, more than two years after the said principal had been discharged and canceled by his payment; and that the plaintiff should be held to be estopped to claim payment to him, because he failed and neglected to give notice of the assignment to him of the said note and mortgage.

The third defense, in addition to the foregoing, alleges further that the plaintiff never at any time gave notice to any of the defendants that he claimed to be the owner by assignment or other right of the note and mortgage until May 12, 1902, more than two years after the note had been fully paid to the company and its satisfaction of the mortgage entered of record in Gallatin county; that the plaintiff, by his acts and conduct in permitting the company to collect the interest coupons from time to time, had held it out to the defendants as his agent to collect the note and cancel the mortgage, and that for this reason the said company had authority to collect the note and enter the satisfaction of the mortgage, and that by reason of his silence and omission and failure to notify defendants that

the company did not have authority to collect the indebtedness, and by reason of the conduct of the plaintiff in holding out to the defendants that the company did have authority to collect and receive payment of the same, the plaintiff cannot now be heard to say that the company did not have such authority, both to receive payment and discharge the mortgage.

The fourth defense alleges that the plaintiff never gave the defendants, or any of them, notice that he claimed to be the owner of the note or interest coupons or the mortgage until May 12, 1902, more than two years after the indebtedness had been paid and the mortgage had been released and canceled; that by his conduct in permitting the company to collect the interest coupons the plaintiff held it out to the defendants Woolverton and Kirk as his agent with authority to collect and discharge the debt, and that, relying upon its ostensible authority to receive payment, the said Kirk paid the full amount of the debt to it; that during all of the time from August 1, 1895, to August 1, 1900, and for about twenty months after the last-mentioned date, the company was solvent and able to respond in damages; that on or about March 14, 1902, it was found to be insolvent, and a receiver was appointed to wind up its affairs; that the receiver has no assets out of which the defendants might have reimbursement for the moneys paid to the company in discharge of the indebtedness; that plaintiff did not notify the defendants of his purchase of the note and mortgage until the company had been found to be insolvent; that the defendants could and would have secured reimbursement for the payments to the company as aforesaid, or have obtained security therefor, had they received notice in a reasonable time that the company had no authority to receive the payment; and that by reason of plaintiff's negligence in failing to notify defendants of the fact that the company was not his agent in the premises plaintiff is now estopped to say that the company did not have authority to act for the plaintiff and to receive payments made to it in the discharge of said indebtedness and to discharge the mortgage.

To each of the defenses a general demurrer was interposed by the plaintiff. This, after argument, the court sustained, and, the defendants declining to plead further, a decree was entered granting the relief prayed for in the complaint. From this decree the defendants have appealed.

Counsel have confined their discussion in their briefs to the questions arising upon the action of the district court in sustaining a general demurrer to the last three defenses, it being assumed that the first defense, though good in form as a general plea of payment, would be supported in a hearing on the merits only by the facts specifically pleaded in the other defenses. Therefore the correctness of the view of the court as to the sufficiency of that defense is eliminated from the case, and it will not be necessary to consider its action in this connection.

The questions presented for decision are: 1. Is the note in suit negotiable? 2. If not, did plaintiff take subject to the defense of payment made by the grantee of the Woolvertons prior to actual notice of the assignment? 3. Do the facts stated show an agency of the company to receive payment? And 4. Is the plaintiff estopped to demand payment?

1. As to the negotiability of the note in suit. It will be noted that by its terms the principal sum named therein is to bear six per cent interest, payable semi-annually, the installments being evidenced by coupons, each for \$45. There is added this clause: "This note and these coupons are to draw interest at the rate of twelve per cent per annum after maturity, and are secured by a mortgage of even date herewith," etc. Does the latter clause render it non-negotiable?

Prior to the adoption of the present Code, which became operative on July 1, 1895, the common-law rule of interpretation under the law merchant was in force in this state, and it was accordingly held that a stipulation for the payment of an attorney's fee in a bill of exchange did not destroy its negotiability. This court followed the line of decisions which sus-

tain both the validity of the stipulation and the negotiability of the instrument in *Bank of Commerce v. Fuqua et al.*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588. This holding was based upon the theory that the condition or stipulation for the payment of an attorney's fee could not and did not attach until after maturity, when the instrument, otherwise meeting the requirements of the law merchant as to definiteness and certainty in its terms, had ceased to be negotiable. The Code contains provisions, however, which obviously were designed to set at rest all doubts and uncertainties arising from conflicting decisions of courts under the common-law rule. These are found in sections 3990 to 3997 of the Civil Code. So far as pertinent to the present discussion, they are as follows:

"A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article." (Section 3991.)

"A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." (Section 3992.)

"A negotiable instrument may contain a pledge of collateral security with authority to dispose thereof." (Section 3996.)

"A negotiable instrument must not contain any other contract than such as is specified in this article." (Section 3997.)

Section 3996 was amended by the Act of 1899 (Session Laws of 1899, p. 124) by an addition thereto of the clause, "also a provision for reasonable attorney fee or both." The amended section, however, does not apply to the note in suit (*Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761), so that its character must be determined by the provisions of the Code as they stood prior to the amendment. Indeed, it is manifest that the amendatory Act did not work a change in the provisions of the Code, except in the one particular that it authorizes a stipulation for a reasonable attorney's fee in addition to a stipulation for collateral security, with authority to dispose thereof. The

amendment was evidently made for the purpose of obviating the result of the decision of this court in the case of *Stadler v. First National Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, for it was enacted by the legislature which was sitting at the time the decision was rendered (*Bullard v. Smith, supra*), and goes no further than to make a promissory note containing a stipulation for an attorney's fee negotiable. The history of the amendment clearly justifies this conclusion.

In *Stadler v. Bank, supra*, it was held that this stipulation rendered a promissory note non-negotiable, because such a stipulation was violative of sections 3992 and 3997, *supra*, in that the stipulation was not certain of fulfillment, and was also a contract other than a specific promise to pay the principal sum named in the note, with interest. The decision was based upon the only construction of which the provisions of the Code are susceptible, as well as upon the decided cases, both state and federal, involving the construction of identical statutory provisions. The case before us is distinguishable from that case only in the character and purpose of the particular stipulation. The provisions of the statute are clearly prohibitory, and apply to all sorts of conditions not certain of fulfillment, whether they attach before or after maturity, and to all sorts of contracts other than the principal promise and those stipulations which fall within the exceptions provided for in the statute.

Many cases are cited by the respondent to support his contention that the particular stipulation does not destroy the negotiability of the note in suit; but all, with one exception, seem to be from states which have not undertaken to fix the rule of negotiability by legislative enactment. It will not be necessary to cite and distinguish these cases. Counsel for respondent relies on *Merrill v. Hurley et al.*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958, as strongly persuasive in favor of the negotiability of the note, if not conclusive. Particular stress is laid upon the fact that the same court which had decided the case of *Hegeler v. Comstock*, 1 S. D. 138, 45

N. W. 331, 8 L. R. A. 393, in the later case held a promissory note containing conditions similar to those involved in the case of *Hegeler v. Comstock* not to be obnoxious to the provisions of the statute. *Hegeler v. Comstock* was cited and approved in *Stadler v. Bank, supra*; but counsel say the latter should not be followed in this case, if *Merrill v. Hurley* was correctly decided. In *Merrill v. Hurley*, the supreme court of South Dakota practically overrules and destroys the effect of *Hegeler v. Comstock*. Although the court undertakes to distinguish the former from the latter, the writer confesses that, in his opinion, they are not, on principle, distinguishable, and that the result of the later decision is to overrule the former. Both of them abound in citations of decisions of courts which are controlled by the common-law rule, and in both of them the purpose and effect of the statutory provisions seem to have been, in a measure, at least, entirely overlooked.

In *Hegeler v. Comstock* the uncertain condition held sufficient to destroy the negotiability of the particular instrument was found in the clause, "with interest from date until paid at the rate of ten per cent per annum, eight per cent, if paid when due." The note in suit in *Merrill v. Hurley*, though it contained the clause, "If any part of the principal is not paid at maturity, it shall bear interest at the rate of twelve per cent per annum, payable annually; and, if any interest remains unpaid twenty days after due, the principal shall become due and collectible at once without notice, at the option of the holder"—was held not to be uncertain, or to contain an additional contract within the prohibition of the statute. In our view, the cases cannot be reconciled, and, by failing to observe the express provisions of the statute and following the analogies of the decisions of courts which are controlled by the common-law rule of interpretation, the court seems to have fallen again into the confusion which it is the purpose of the statute to remove. As was said in *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 54, 7 L. R. A. 224: "These Code provisions were evidently intended to remove, and they do remove, all doubt which conflicting de-

cisions had thrown over such questions as the one arising in the case at bar." Though this latter case and the case of *Stadler v. Bank, supra*, had to do with a stipulation for an attorney's fee, liability for which could not attach until after maturity, yet no substantial distinction can be pointed out between such a stipulation and any other which attaches only after maturity, or any contract other than the agreement to pay the principal sum demanded or promised.

The cases cited for illustration and as persuasive authority in the two South Dakota cases do not aid in the solution of the question before us, for the reason that, in our opinion, its solution depends wholly upon the construction to be given to the statute, as is stated in the case of *Adams v. Seaman, supra*. The correct conclusion was reached, after an examination of the authorities, in the case of *Stadler v. Bank*, and we deem it controlling in this case. It is not certain that the condition referred to will be fulfilled, and it is a contract other than one authorized by the statute. The note is therefore non-negotiable.

For another reason it is non-negotiable. It refers on its face to the mortgage. Section 2207 of the Civil Code provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Under the rule of construction here declared, the conditions and stipulations embodied in the one must be construed to enter into and constitute a part of the other. So that, if the mortgage referred to in the note contains conditions which render the note uncertain as to the amount to be paid and the time of payment, these must be read into the note. The two must be read and construed together to ascertain the nature of the agreement upon which the negotiable character of the note depends. The reference to the mortgage brings to the notice of everyone dealing with the note all the conditions attached, so that, even though it should be held negotiable so far as concerns the conditions expressed upon its face, its negotiable character must be determined by the provisions of the mortgage. This section of the statute

sets at rest any question which might otherwise exist as to the rule of construction applicable. The note and mortgage refer to each other. They are contracts relating to the same subject matter. They are between the same parties. They are both parts of substantially one transaction. Therefore they constitute one contract. (*Meyer v. Weber et al.*, 133 Cal. 681, 65 Pac. 1110.)

Apart from the statute, there is a conflict in the decisions, the courts of some states applying the rule declared by the statute, but others holding that the conditions contained in the mortgage do not affect the character of the note secured thereby. In this state the mortgage is but an incident, and passes to the assignee of the note. (Civil Code, sec. 3825.) This, however, does not affect the application of the rule, for it is the general rule in this country that a mortgage does not convey the legal title, but is a mere lien to secure the performance of the contract to which it is incident. The following authorities illustrate the application of the rule: *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; *Daniel on Negotiable Instruments*, secs. 156, 835; *Donaldson v. Grant et al.*, 15 Utah, 231, 49 Pac. 779; *Muzzy v. Knight et al.*, 8 Kan. 456; 1 *Jones on Mortgages*, sec. 71; *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Garnett v. Myers*, 65 Neb. 280, 94 N. W. 803.

The mortgage in this case contains a number of conditions, among them that the mortgagors will pay all taxes imposed upon the mortgaged property or against the holder of the mortgage; that they will pay, when due, all liens and encumbrances upon the premises, and premiums for insurance therein provided for, or, in default of such payment by the mortgagors, that the mortgagee or his successors may pay the same, or any part thereof, whereupon the amount so paid shall bear interest at twelve per cent per annum, and shall be secured by the mortgage in the same manner as the principal debt thereby secured; that they will keep the property in repair; that they will commit no waste; that they will keep the property in-

sured, or, in case of failure, that the mortgagee may do so at the owner's expense, all premiums so paid to become a part of the indebtedness secured; that in default of payment of interest when due, or in the performance of any covenant therein, the principal and interest shall become due at the option of the mortgagee, who may proceed to foreclose; that no judgment rendered upon the note shall be a bar to foreclosure unless payment be made; and that, if suit for foreclosure be brought, \$150 shall be allowed as an attorney's fee, to be added to the amount of the mortgage. Construing these conditions as a part of the note, it is brought clearly within the decision of *Stadler v. Bank*, *supra*, and the cases last cited, and is non-negotiable.

Again, the complaint alleges that the note and mortgage were for a valuable consideration "sold, assigned, transferred, and set over" to the plaintiff by the company. A negotiable instrument, payable to order, must be indorsed by the payee, in order to preserve its negotiability in the hands of a subsequent holder. A transfer without indorsement destroys its negotiable character, and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee. (*Sathre v. Rolfe*, 31 Mont. 85, 77 Pac. 431; *Helena National Bank v. Rocky Mt. Bell Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Foreman v. Beckwith*, 73 Ind. 515; 1 Daniel on Negotiable Instruments, sec. 741.)

The contention is also made by the appellants that a note, though negotiable in form, if secured by mortgage, is not negotiable in this state, even though it contains no reference to the mortgage, and without regard to any conditions contained in the latter. This contention is based upon the provisions of our statute (section 1290, Code of Civil Proc.), which declares that "there is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property." In support of this contention counsel cites, among other cases, *Brophy v. Downey*, 26 Mont. 252, 67

Pac. 312, and *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808. These cases are not directly in point, as the question here involved was not before the court in either of them. Counsel in the argument did not dwell upon this phase of the case, nor press it for decision. Inasmuch as the question involved is one of importance, we prefer to reserve a decision of it until a case arises in which we may have the advantage of full argument. What we have already said as to the first three contentions made by appellants is determinative of this feature of the case.

Did the plaintiff take the note subject to the defense of payment by Kirk prior to actual notice of the assignment? Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity." This section was considered by this court, and construed in connection with sections 690, 691, 692, and 698 of the Code of Civil Procedure, and also section 1982 of the Civil Code, relating to the transfer of non-negotiable contracts for the payment of money or personal property, in *Stadler v. Bank*, *supra*. The conclusion reached was that section 571 was rendered necessary by the enactment of section 570, which requires all actions to be brought and prosecuted in the name of the real party in interest. At the common law the assignee of a non-negotiable contract could not sue in his own name, but in the name of the assignor only. The change having been wrought by section 570, it became necessary to enact some such provision as section 571 to declare and protect the rights of the defendant as they existed at the common law, notwithstanding the provision of section 570. It was further held that section 571 is not in conflict with section 1982 of the Civil Code, and that neither in any way enlarges the scope of the other or affects the purpose which it

was intended to accomplish. The purpose of the latter is, as was there held, to protect the assignee of a non-negotiable contract against counterclaims, including set-offs, alleged as defenses, unless they fall within the provisions of sections 690, 691, 692, and 698, *supra*; that is, unless they are in existence and available at the date of the assignment. Its purpose is not to affect in any way or change the rights of the defendant arising out of new dealings or agreements with reference to the particular contract had with the creditor subsequent to the assignment, but prior to notice thereof to the defendant. As has been said, the right to avail of these defenses is protected by section 571, and, whatever the rights of the defendant would have been at the common law as against the assignee, they have been preserved under this section. The court, speaking through Mr. Justice Pigott, quotes with approval from *Beckwith v. Bank*, 9 N. Y. 211: "Section 112 was intended only to introduce such alterations in the mode of protecting them [the substantial rights of the parties] as were rendered necessary by the provisions of sections 111 and 113, which require in most cases the real party in interest to be the plaintiff. The first branch of the section will have its full and appropriate meaning if we regard it as providing that 'in the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment,' which would have been available to the defendant had the action been brought in the name of the assignor. In other words, the provision is that the substantial rights of the defendant shall not be affected by the substitution of the assignee as plaintiff in place of the assignor." Then, after observing that section 112 of the New York Code is identical with section 571, *supra*, and that sections 111 and 113 are similar to section 570, *supra*, the opinion quotes from *Myers v. Davis*, 22 N. Y. 489, as follows: "The alteration of the practice allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to

any assignment of it. The defendants in this action are therefore entitled to the same defense which they would have had if the former rule had continued to prevail, and this action had been brought in the name of Watrous and Lawrence (assignors), and to no other or different defense. The assignee would have been protected in his equitable rights, notwithstanding the non-negotiable nature of the contract, to the same extent that he is entitled to have them protected now that he can prosecute in his own name. The change effected by the Code is simply as to the form in which the action is to be carried on."

From these provisions, thus construed, this rule is therefore deduced: That the assignee of a non-negotiable contract made for the "payment" of money or personal property, under section 1982, *supra*, takes all the rights of the assignor, subject only to the equities and defenses existing in favor of the maker at the time of the assignment, and that matters arising out of subsequent dealings between the maker and assignor, not relating to the contract, but which would be defenses in an action by the assignor, are not available as against the assignee, even though notice of the assignment be not given to the maker; but that in order to cut off defenses arising out of dealings with relation to the contract itself between the maker and assignor after the assignment—such as payment, release, etc.—notice of the assignment is necessary; so that under section 571, *supra*, if the maker, without notice of the assignment, in good faith pays the assignor the amount of the debt or obligation, and takes an acquittance, this constitutes a complete defense to a suit by the assignee.

2. What was the effect of the payment to the company by Kirk after record of the assignment of the note and mortgage to the plaintiff?

A mortgage is a conveyance within the meaning of the record laws of this state (sections 1640-1642, Civil Code), though it is a conveyance of a chattel interest only. (Civil Code, sec. 3810 *et seq.*; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 582; *Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512.) Title to it

passes to an assignee by assignment of the debt or obligation secured by it (section 3825, Civil Code); for the mortgage is but an incident—a security—and, independent of the debt, has no assignable quality. Such an assignment is a mere nullity. (*Rader v. Ervin*, 1 Mont. 632; *Polhemus v. Trainer*, 30 Cal. 686.) Where there is no written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment. Nevertheless the debt is the principal thing, and the title to the mortgage must follow an assignment of it. (Section 3825 Civil Code.)

The appellants contend that, though the assignment of the mortgage to Cornish was recorded long before the purchase and payment by Kirk to the company, this gave constructive notice to those persons only who derived title to the mortgage from the company, and therefore that the record was not notice to Woolverton, or to Kirk, so as to invalidate Kirk's payment to the company. The ground of this contention, as counsel asserts, is that section 3823 of the Civil Code expressly declares that the record of the assignment gives notice only to persons deriving title from the assignor. This section provides: "An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor."

Section 3824, however, provides further: "When the mortgage is executed as security for money due, or to become due, on a promissory note, bond or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond or other instrument." Section 3823 does not declare that the assignment shall be notice to such persons only as derive title from the assignor; while from the language of section 3824 there arises a strong implication that such a record does operate as notice to a mortgagor, so as to invalidate any payment made by him, his heirs or personal representatives, to anyone not

holding the note, bond, or other instrument. Under section 1640, *supra*, the record is notice to all persons of the contents of the assignment.

Construing all these provisions together, the conclusion seems inevitable that the record operates as notice to all persons dealing with the assignor in any capacity whatever, with the exception of those designated in section 3824; and even these are protected only when the assignor holds the evidence of the debt. Such being the case, the payment to the company by the Woolvertons would have been ineffectual to discharge the mortgage in the absence of a showing by appropriate allegation that the company held the note. Much less, then, was the encumbrance discharged by payment made by Kirk, for, so far as the allegations show, the company was not at the date of the payment in possession of the note; nor is he included within the class who might have discharged the mortgage by payment to the holder of the note prior to actual notice of the assignment. His payment, therefore, must be regarded as having been made at his own risk, and as being wholly ineffectual to discharge the mortgage.

The construction of these provisions is attended with some difficulty; but the conclusion stated is supported by the supreme court of California under identical statutes (*Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542), and by the courts of other states having similar provisions. (1 *Jones on Mortgages*, sec. 480; *Van Keuren v. Corkins et al.*, 66 N. Y. 77; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 100; *Williams v. Keyes*, 90 Mich. 290, 30 Am. St. Rep. 438, 51 N. W. 520; *Larned v. Donovan*, 155 N. Y. 341, 49 N. E. 942; *Viele v. Judson*, 82 N. Y. 32.)

In purchasing the mortgaged property from Woolverton, Kirk purchased it with notice of the contents of the assignment by the company to the plaintiff, for he was bound to read the record and ascertain the facts shown by it. It was a clear in-

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As we have seen, the assignment was recorded. This was no-
 tice to both Kirk and Metheny that they could not safely pay

to anyone but the plaintiff or his duly authorized agent. The
 mere fact that the company acted as the agent of the plaintiff

in collecting the interest and delivering the canceled coupons
 is not sufficient to show authority to collect the principal and

discharge the mortgage. (*Stark v. Olsen*, 44 Neb. 646, 63
 N. W. 37.) If, in addition to this fact, it were alleged that

the company, at the time of payment, had the note in its pos-
 session, the inference might be permissible that it was the

agent to collect it. In dealing with a supposed agent, how-
 ever, Kirk was bound to ascertain the scope of its authority;

otherwise he assumed the risk, and he and his grantee must

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be a revocation of the authority." In the same case it

is also said: "If money be due on a written security, it is the

duty of the debtor, if he pay to an agent, to see that the person

to whom he pays it is in possession of the security. For,

though the money may have been advanced through the me-

dium of the agent, yet, if the security do not remain in his pos-

session, a payment to him will not discharge the debtor."

Cornish, the plaintiff, had done all in his power to notify all persons dealing with the company with reference to the mortgage that he was the owner of it. Under the circumstances, payment by Woolverton would not have been effectual, for, so far as the answer shows, the company was not in possession of the security. Much less can Kirk and Metheny claim that the debt was discharged by Kirk's payment. That payment must be made a second time by Kirk is a distinct hardship upon him; but, so far as the allegations of the answer show, it would be equally as great a hardship to deny the plaintiff the right to collect the money paid by him for the mortgage. The plaintiff did not fail to take the precautions necessary to protect himself. Kirk was guilty of negligence in this behalf, and of the two, he, being in fault, must suffer.

4. Nor do we think the facts alleged in the fourth paragraph of the answer sufficient to estop the plaintiff. Having given notice of the assignment in the manner provided in the

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statute, he was not thereafter bound to do anything to protect the defendants against the criminality and fraudulent conduct of the officers of the company. Nor, after the company became insolvent, was he compelled to proceed at once to enforce the collection of the debt. So far as the record shows, he knew no more of the condition of the affairs of the company than did the defendants; and, if he had known, it did not follow that he knew of the payment by Kirk, and the release of the mortgage by the company. His recorded assignment being notice of his rights, he was not bound to take notice of subsequent dealings of the company with any of the defendants with reference to the mortgage; and while his delay in pursuing his debtor may seem peculiar, or even suspicious, this is not sufficient to estop him. He had the full time allowed by the statute of limitations in which to bring his action. There is nothing alleged in the answer tending to show that he failed to speak when he should, or that he actively or passively misled the defendants, or any of them, to their prejudice by anything that he did or failed to do.

For these reasons we think the action of the court below in sustaining the demurrer was correct, and that the judgment should be affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

32	480
133	211
134	402

MONTANA ORE PURCHASING COMPANY, RESPOND-
ENT, v. MAHER, COUNTY TREASURER, APPELLANT.

(No. 2,145.)

(Submitted May 2, 1905. Decided June 3, 1905.)

*Taxation—County Board of Equalization—Assessment—In-
crease—Failure to Give Notice—Effect—Minute Entries—
Parol Evidence—Injunction—Decree.*

County Board of Equalization—Assessment—Increase—Notice.

1. The giving of ten days' notice to the taxpayer is essential to confer upon a county board of equalization power to increase the assessed valuation of his property under section 3781 of the Political Code, or to correct such assessment under the provisions of section 3789 of the same code. In either case the ten days' notice is jurisdictional.

Same—Assessment—Increase—Notice—Waiver.

2. Failure by the county board of equalization to give a taxpayer the ten days' notice of an increase in his assessment required by statute, is not waived by his voluntary appearance before the board, after the raise had been made, for the purpose of seeking a reduction of the assessment.

Same—Final Action of Board—Record.

3. An entry on the minutes of the county board of equalization, after reciting errors in the returns made to the assessor by a taxpayer, directed that officer to make the proper correction in the assessment. The pleadings admitted that the board made the entry with respect to the assessment in the amount stated in the entry. *Held*, that no other changes or records being shown, a contention that final action was not taken in the matter until after the taxpayer's voluntary appearance before the board was without merit.

Same—Minute Entries—Parol Evidence.

4. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the proceedings had before the county board of equalization, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.

Same—Jurisdiction of Board—Affirmative Showing—Record.

5. As the county board of equalization, acting on assessments of property, is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear affirmatively from the record of its proceedings.

Same—Jurisdiction of Board—Notice—Minutes.

6. Where the minutes of the county board of equalization showed that it did not meet until July 20th, and that a raise in an assessment was made July 29th, and before any appearance on the part of the taxpayer affected thereby, it was apparent that the ten days' notice of the raise, required by statute, could not have been given, and the board was without jurisdiction in the matter.

Same—Assessment—Increase—Jurisdiction—Injunction.

7. *Held*, that where the county board of equalization made an increase in an assessment without giving the statutory notice of ten days to the person affected thereby, such notice being jurisdictional, and omission to give it not being a mere irregularity subject to explanation, injunction will lie to restrain the collection of taxes computed on the raised valuation.

Same—Decree—Payment of Taxes Admittedly Due—Condition Precedent.

8. Where the county board of equalization raised an assessment without giving the ten days' notice required by statute, a decree enjoining the county treasurer from selling the property to pay the taxes computed on the raised valuation, without requiring, as a condition precedent, the payment of the tax admitted by the taxpayer to be due, was erroneous.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by the Montana Ore Purchasing Company against James Maher, county treasurer of Silver Bow county. From a judgment in favor of plaintiff, defendant appeals. Modified and affirmed.

Mr. Albert Galen, Attorney General, Mr. F. W. Mettler, and Mr. J. Bruce Kremer, for Appellant.

When one invokes a court of equity for relief against the payment of taxes, he must do equity by paying, or offering to pay, the amount justly due from him, or that part which he admits to be legal—that he must pay or tender the amount which is properly chargeable against his property, upon which condition alone relief will be granted. (21 Ency. of Pl. & Pr. 456, 457, and cases cited; 10 Ency. of Pl. & Pr. 934, and cases cited in note 3; High on Injunctions, secs. 497, 499; *Cannon v. Handley*, 72 Cal. 142, 13 Pac. 315; *Dodge v. Fearey*, 19 Hun, 272; *Summerson v. Hicks*, 134 Pa. St. 566, 19 Atl. 808; *Bell v. Clark*, 111 Pa. St. 92, 2 Atl. 80.) The tender should be continued in and by the pleadings, and the facts averred should show that it has been kept good ever since the time when it was made. (*Burlock v. Cross*, 16 Colo. 162, 26 Pac. 143; *Reddington v. Chase*, 34 Cal. 670; 21 Ency. of Pl. & Pr. 553; 25 Am. & Eng. Ency. of Law, 922, note 3.) In equity no less strictness is required in keeping good and in pleading a tender than in courts of law. (*McCalley v. Otey*, 90 Ala. 302, 8 South. 157. See, also, *Northern Pac. R. R. Co. v. Patterson*, 10 Mont. 90, 24 Pac. 704.)

Unless it appear affirmatively that a full and fair hearing was denied to it by the action of the board, the plaintiff will be deemed to have waived all irregularities by voluntarily appearing before the board and making application for a reduction. (Political Code, sec. 4014; *Avant v. Flynn*, 2 S. D. 153, 49 N. W. 15; *Gallup v. Schmidt*, 154 Ind. 202, 56 N. E.

443; *Cosier v. McMillan*, 22 Mont. 484, 56 Pac. 965; *Pittsburgh etc. Ry. Co. v. Board*, 172 U. S. 45, 19 Sup. Ct. 90; *Rockafellow v. Board*, 77 Iowa, 494, 42 N. W. 380; *Schottler v. Spring Valley Waterworks*, 62 Cal. 69; *Alliston Ranch M. Co. v. County of Nevada*, 104 Cal. 161, 37 Pac. 875.) "Once having appeared, the cause may proceed, no matter what irregularity there is." (*Knox v. Summer*, 3 Cranch, 496; *Suydam v. Pitcher*, 4 Cal. 280; *Louisville etc. Ry. Co. v. Nicholson*, 60 Ind. 158.) "A voluntary appearance is equivalent to personal service." (*Christal v. Kelly*, 88 N. Y. 285.) "If there is an irregularity in giving notice, the appearance of the defendant will waive the defect, and jurisdiction will attach." (*Clark v. Borrel*, 21 Hun (N. Y.), 594; *City of Rockland v. Ulmer*, 87 Me. 357, 32 Atl. 972; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Wade on Notice*, 1358; *Central Pac. R. Co. v. Standing*, 13 Utah, 488, 45 Pac. 344.)

Mr. James M. Denny, and *Mr. R. R. Wedekind*, for Respondent.

If an assessment is not made as prescribed by statute, it is void. (*City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694; *Grotefend v. Ultz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 367; *Brady v. Dowden*, 59 Cal. 51. See, also, *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *People v. Forrest*, 30 Hun, 240; *Moore v. Street Commrs.*, 134 Mass. 431; 25 Am. & Eng. Ency. of Law, 204.)

Before the commissioners could take any action toward changing the assessment-roll as presented by the assessor, whether correct or not, they must have given notice to respondent. (*Western Ranches v. Custer Co.*, 89 Fed. 577; *Topeka Water Supply Co. v. Roberts*, *Country Treasurer*, 45 Kan. 363, 25 Pac. 855; *Topeka City Ry. Co. v. Roberts*, *County Treasurer*, 45 Kan. 360, 25 Pac. 854; *Commissioners v. Lang*, 8 Kan. 284; *Griffiths v. Watson*, 19 Kan. 27; *Commissioners v. Sargent*, 24 Kan. 572; *French v. Edwards*, 13 Wall. 506;

Cooley on Taxation, 2d ed., 362-366; *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314; *San Antonio v. Hoefling*, 90 Tex. 511, 39 S. W. 918; *Hoefling v. San Antonio*, 15 Tex. Civ. App. 257, 38 S. W. 1127; *Dykes v. Lockwood Mtg. Co.*, 57 Kan. 416, 46 Pac. 711; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340; *Everett Water Co. v. Fleming*, 26 Wash. 364, 67 Pac. 82.)

"The taxpayer is entitled to the remedy of injunction, although he may have first asked the board to cancel and set aside the illegal assessment and levy made against him." (*Topeka City Ry. Co. v. Roberts, County Treasurer*, 45 Kan. 360, 25 Pac. 854; *Topeka Water Supply Co. v. Roberts, County Treasurer*, 45 Kan. 363, 25 Pac. 855; *Commissioners v. Lang*, 8 Kan. 284; *Griffiths v. Watson*, 19 Kan. 27; *Commissioners v. Sargent*, 24 Kan. 572; Cooley on Taxation, 2d ed., 761; *Lumber Co. v. Hayward*, 20 Fed. 422; *Huntington v. Central Pac. Ry. Co.*, 2 Saw. 514; *Carroll v. Perry*, 4 McLean, 27; *Pettit v. Shepard*, 5 Paige, 501; Story on Equity Jurisprudence, 8-17; High on Injunctions, secs. 248-529, and cases cited; Pomeroy's Equity Jurisprudence, 1345, and cases cited.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court:

This is an appeal from a final judgment. It is alleged in the complaint that after the 1st day of June, 1903, the Montana Ore Purchasing Company furnished to the county assessor of Silver Bow county a verified statement of the net proceeds of its mines for the year immediately prior to June 1, 1903, showing such net proceeds to be \$601,250.23; that the county assessor extended the assessment on the rolls without change, and in the due course of his business turned over the assessment-roll to the county clerk; that afterward the county commissioners met, and organized as a board of equalization, and adopted rules, as provided by section 3781 of the

Political Code. Rule 7 is as follows: "That a notice of ten days from date in writing be given to property owners or their agents, to appear before the board of equalization, and show cause why assessments for the current year should not be increased."

It is further alleged that, without giving the respondent company any notice whatever, its assessment was increased to \$843,346; that respondent tendered the amount of taxes due upon the assessed valuation of \$601,250.23, but this was refused, and the taxes computed upon the valuation of \$843,346 demanded; that the county treasurer afterward advertised the property of the respondent company for sale to pay the taxes then delinquent. Ability, readiness, and willingness to pay the tax admitted to be due is alleged. The prayer is that it be adjudged that the increase in respondent's assessment, together with the tax levied upon such increase, be declared void, that the court adjudge that the amount tendered is the correct amount due for its taxes, and that an injunction issue to prevent the sale of its property.

The answer raises but few issues. It is alleged that the return made by the respondent company to the assessor contained information from which it appeared that a mistake in calculation had been made, and that according to such return the sum of \$843,346.24 was the actual value of the net proceeds of respondent's mines. It is also alleged that the respondent appeared before the board of equalization and sought a reduction of its assessment.

The cause was tried to the court, which found in favor of respondent, and entered a decree adjudging that the tax levied upon the increased assessment of \$242,096.01 was void, and that the amount tendered by the plaintiff company was the amount of taxes legally levied upon its property, and enjoined the treasurer from proceeding further in the matter of the sale of its property. From this judgment the county treasurer appeals.

Only three questions are presented for determination: 1. Was the act of the board of equalization in correcting the respondent's assessment and raising the valuation of its property for the purpose of taxation from \$601,250.23 to \$843,346.24, without first giving notice to the respondent, illegal, and the tax on such increase void? 2. Did the voluntary appearance of the respondent before the board, after the change had been made, cure the lack of notice in the first instance? 3. Did the respondent pursue the proper remedy? These questions have all been determined by comparatively recent decisions of this court.

1. The authority of the county board of equalization to make any increase in the assessed valuation of property, or to order the assessor to make any correction in an assessment which has the effect of adding to the amount of taxes which the taxpayer will be called upon to pay, is found in sections 3781 and 3789 of the Political Code, which sections read as follows:

"Sec. 3781. The board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower any assessment contained in the assessment-book, so as to equalize the assessment of the property contained therein, and make the assessment conform to the true value of such property in money."

"Sec. 3789. During the session of the board of county commissioners it may direct the assessor to assess any taxable property that has escaped assessment, or to add to the amount, number, or quantity of property when a false or incomplete list has been rendered, and to make and enter new assessments (at the same time canceling previous entries) when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax; but the clerk must notify all persons interested, by letter deposited in the postoffice, postpaid, and addressed to the person interested, at least ten days before action is taken, of the day fixed when the matter will be investigated."

As the board by its rule No. 7, prescribed that ten days' previous notice should be given before an increase in an assessment should be made, it becomes entirely immaterial whether this change be considered as one made by the board for the purpose of increasing the assessed valuation of this company's property, as provided by section 3781 above, or whether it be considered as a correction which the board ordered the assessor to make under the provisions of section 3789 above; for in either event ten days' previous notice to the taxpayer was essential to confer upon the board power to make the change in the one instance, or to order it done in the other.

This question was lately fully discussed by this court and determined in *Western Ranches, Ltd., v. Custer County*, 28 Mont. 278, 72 Pac. 659, and that case is decisive of this question. In that case the board proceeded under section 3789. There was a failure to give notice to the taxpayer, as in this instance, and respecting the action of the board in making such change without previous notice to the taxpayer this court said: "It is patent that the board had no jurisdiction to increase the plaintiff's assessment without first giving the ten days' notice provided by statute," and then quoted with approval the following language from the case of the same title in 89 Fed. 577: "Did the failure to give the notice before the listing of the property invalidate the tax? I think it did. The notice required by this section was for the protection of the taxpayer, and intended to give him a hearing before the listing of his property in a supplemental list, and was jurisdictional. Without such notice the board of equalization has no right to order the assessor to make the supplemental list: Cooley on Taxation, 2d ed., 362-366; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Powder River Cattle Co. v. Board of Commissioners of Custer Co. (C. C.)*, 45 Fed. 323; *Dykes v. Mortgage Co.*, 2 Kan. App. 217, 43 Pac. 268." (See *State v. Equalization Board*, 18 Mont. 473, at 477, 46 Pac. 266, 267; 27 Ency. of Law, 2d ed., 704, 705, and numerous cases cited.)

2. Was the failure to give notice cured by the company's voluntary appearance on August 7th and 10th, after the raise had been made? This question also was determined by this court in the case cited above, where it is said: "The failure to give plaintiff the required notice having rendered the tax illegal because the board had acquired no jurisdiction to act with reference thereto, the fact that the plaintiff voluntarily appeared on August 8th, and asked a reduction of its assessment, which was partially granted, did not obviate or waive the want of jurisdiction in the board's original action. This question was not raised in *Cosier v. McMillan*, 22 Mont. 484, 56 Pac. 965, cited by defendant. Plaintiff was seeking a reduction of its assessment, and therefore properly appeared before the board to ask the same. (*Barrett v. Shannon*, 19 Mont. 397, 48 Pac. 746.)"

Some contention is made, however, that final action in the matter of this change of valuation was not taken until after the voluntary appearance of the company's representatives; but there is no merit whatever in this. The minutes of the board show the following entry respecting this change, made on July 29, 1903: "In the matter of the assessment of the M. O. P. Co., for 1903: Whereas, it appears that said company has made returns to the assessor showing 293,332 tons extracted at a cost of \$3.54 per ton, or a total of \$1,039,028.88; and whereas, the total amount is incorrect, as the figures should read \$1,038,395.28; and whereas, the cost of reduction per ton is figured wrong, the figures returned to the assessor showing \$3.62 per ton for reduction, or a total of \$1,303,564.69, according to tonnage returned, the figures should read \$1,061,861.84; and whereas, the above errors show a discrepancy in the net proceeds as returned by said company of \$242,096.01: Now, therefore, it is hereby ordered that the county assessor make the proper correction in said assessment of the net proceeds of the said M. O. P. Co., and assess said company with the full amount of the net proceeds, as shown by their returns on the tonnage extracted and reduced." And the pleadings admit

that the board made, or caused to be made, these entries with respect to the company's assessment, to wit: "Increased by board of equalization, \$242,096. * * * Total assessed value as equalized by county board of equalization, \$843,346." So far as this record discloses, these were the only changes made and the only records of the same.

Defendant in the court below, over the objection of the plaintiff company, sought to show by the oral examination of the chairman of the board that final action was not actually taken on July 29th; but the effect of such testimony was to vary or contradict the recitals in the minute entries of the board's proceedings by parol testimony, and this cannot be done. (*State v. Crookston Lumber Co.*, 85 Minn. 405, 89 N. W. 173; 27 Ency. of Law, 2d ed., 717.) Furthermore, as the board of equalization, acting on assessments of property, is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear *affirmatively* from the record of its proceedings. (*Copper Queen Con. M. Co. v. Board* (Ariz.), 65 Pac. 149; 27 Ency. of Law, 2d ed., 717.) There is no pretense that the minutes of the board show that any notice was given; nor is it even contended that any notice in fact was given to the company before the raise was made. Those minutes do show that the raise was made on July 29th, and before any appearance on the part of the company, and before ten days' notice could possibly have been given, for the board did not meet until July 20th. The decision in the *Custer County Case* above is conclusive here. That decision in this particular is reaffirmed, and the doctrine therein announced applied.

3. Did the plaintiff pursue the proper remedy? Section 4023 of the Political Code provides: "No injunction must be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the nonpayment of taxes, except: 1. Where the tax, or the part thereof sought to be enjoined, is illegal, or is not authorized by law. * * * 2. Where the property is exempt

from taxation." This section was adopted as a part of the Code. At the same session of the legislature at which the Codes were adopted, an Act was passed and approved March 18, 1895, and by direction of the legislature the sections of this last-named Act were incorporated in the Political Code, and became sections 4024, 4025, and 4026. Sections 4024 and 4025, above, provide for the payment under protest of taxes demanded, and for a suit at law to recover back the whole, or any part thereof, deemed by the taxpayer to be unlawful, and of this statutory remedy section 4026 says: "The remedy thereby (hereby) provided shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate."

A consideration of sections 4023 and 4026 leads us to believe that the phrase "irregularly levied or demanded" was used by the legislature advisedly, and as prescribing the limits wherein the statutory remedy is exclusive, as distinguished from those cases of illegal taxes the collection of which may be restrained by injunction. In other words, if the action of the assessor or board of equalization was such that the tax complained of is manifestly void under any circumstances, injunction will lie to restrain its collection; but, if the error complained of is only an irregularity on the part of the assessor, the board of equalization, or the treasurer, which may be subject to explanation so as to cure the apparent defect, or, in other words, where the tax complained of is not necessarily void under all circumstances, then the remedy provided by sections 4024 and 4025, namely, payment under protest and an action to recover back is exclusive, except in those unusual cases mentioned in section 4026. This is the effect of the decision in *Cobban v. Hinds*, 23 Mont. 338, 59 Pac. 1, where it is said: "Sections 4023 to 4026, inclusive, of the Political Code, prohibit courts and judges from enjoining the collection of any

tax, and from restraining the sale of the property for nonpayment of any tax, except in those instances where the tax is illegal, or not authorized by law, or where the property is exempt from taxation, and provide the means and remedies whereby the rights of persons who deem the taxes irregularly or improperly demanded of the owners, or sought to be enforced against the property, may be guarded and protected."

At the time of the decision in the *Custer County Case*, above, the decision in *Cobban v. Hinds* seems to have been overlooked, and language is to be found in the opinion in the *Custer County Case* which might seem to support a view contrary to the one held in the *Cobban Case*; but the conflict in the decisions is more apparent than real, and, while we think that some of the language in the *Custer County Case* is too broad, these decisions are easily reconcilable. So far as this branch of the case was concerned, the only question involved in the *Custer County Case* was: May one whose assessment has been increased by the board of equalization, without notice to him, where the increase is without authority and the tax on such increase illegal, pay the entire tax charged against him and sue to recover back the illegal portion, under sections 4024 and 4025, *supra*, or is his remedy one in equity exclusively, as provided by section 4023 above? We held that the complaining taxpayer might pursue the statutory remedy, and this was all that was necessary to decide in that case respecting this subject. We think the decision in this regard correct. It simply means that, while one may have a sufficient cause of action to justify him in proceeding in equity, if he elects to proceed at law, he may do so. Of course, the converse of that proposition is not true; for if one has a remedy at law, which is plain, speedy and adequate, he cannot have any standing in a court of equity. In the *Custer County Case* the board of equalization directed the assessor to add to the plaintiff's assessment a large amount of property which the plaintiff did not own. This increase was made without notice to the taxpayer, but the entire tax was paid, and a statutory action brought to recover back the

portion of the tax which was illegal. In this court the question was raised as to whether the plaintiff could pursue the statutory remedy, or whether the remedy was not one in equity. Respecting this we said: "We think the plaintiff pursued the proper remedy in paying the taxes demanded under protest, and afterward bringing suit to recover them." We might more properly have said that the plaintiff pursued a proper remedy at its disposal; and, had we done so, the decision would have appeared more completely in harmony with the decision in the *Cobban Case*. But, when read in the light of the particular question presented for determination, the language used is not misleading, and there was no intention on the part of this court to announce a rule different from the one in the *Cobban Case*.

In the *Custer County Case* it is said that if there is any conflict between the provisions of section 4023 and the Act of March, 1895, the latter provisions control. It is to be observed that we did not say that there is in fact any conflict; and upon further consideration, and in view of the decision in the *Cobban Case*, we think there is in fact no conflict whatever, and that the construction placed upon section 4023 and the Act of March 18, 1895, by this court in the *Cobban Case*, is logical. By this construction section 4023 and the provisions of the Act of March 18, 1895, remain in full force and effect, and this conclusion satisfies the rule of statutory construction, which requires such a result, if possible.

4. The decree: The decree entered in this case is erroneous in enjoining the county treasurer from proceeding to sell the property of the respondent company without requiring the payment of the tax admitted to be due as a condition precedent. The cause is remanded to the district court, with directions to modify the decree by adding a provision requiring payment of the tax admittedly due within ten days after such modification is made and the respondent notified thereof, and upon failure by respondent to make such payment within the time limited the injunction be dissolved and the action dismissed. With

this modification, the judgment will be affirmed; but each party will be required to pay his own costs of this appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1905.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, }
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE, RESPONDENT, v. FRANCESCHI, APPELLANT.

(No. 2,192.)

(Submitted June 3, 1905. Decided June 6, 1905.)

Filing and Serving Briefs—Attorney General—Rules—Record—Alteration—Dismissal.

Rules—Supreme Court—Filing Briefs.

1. Supreme Court Rule X, subdivision 5 (30 Mont. xxxix), which provides that where an appellant is in default in filing his brief the case may be dismissed on motion, will not be relaxed where counsel was not prevented from observing it by press of other professional duties, or interruptions caused by illness or the like.

Practice—Record on Appeal—Alteration Without Order of Court—Dismissal.

2. Where counsel for appellant was allowed by the clerk of the supreme court to take the record from his office, and thereafter the record was rearranged in certain particulars, and changes made by incorporating in it a certificate of the trial judge settling the bill of exceptions and the notice of appeal, and by adding an entirely new certificate of the clerk of the district court, bearing date a

morth later than the supreme court file-marks, the appeal will be dismissed, though counsel, after notice of motion to dismiss, filed a suggestion of diminution of the record and asked for an order directing the clerk of the district court to correct the defects and supply the omissions, theretofore attempted to be done without such order.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

SALVATORE FRANCESCHI was convicted of murder, and he appeals. Dismissed.

Messrs. Mackel & Meyer, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder, and sentenced to a term of imprisonment in the state prison. From the judgment and an order denying him a new trial he has appealed. The attorney general has submitted a motion to dismiss the appeals on the grounds (1) that the appellant has failed to file his brief as required by the rules; and (2) that after the record was filed with the clerk of this court it was withdrawn from his custody by appellant's counsel, and so changed in important particulars while in their custody as to destroy its character as a record of this court.

1. The first ground of the motion is a sufficient reason for a dismissal of the appeal, no sufficient excuse being made to appear why the rule has not been observed. (Rule X, subdivision 5, 30 Mont. xxxix). This rule has often been relaxed upon proper application, and almost as a matter of course, where counsel have been prevented from observing it by press of other professional duties, or interruptions caused by illness or the like. This is not such a case.

2. The facts upon which the second ground of the motion is based are the following: The appeals were perfected some time during the latter part of 1904. After a delay of ninety

days beyond the time allowed by the rule for filing the record in this court, such delay having been waived by the attorney general by stipulation, the record was finally filed with the clerk on April 6th of this year. On April 10th counsel were allowed by the clerk to take the record from his office—for a purpose not then apparent—to their office, in the city of Butte. On May 19th a transcript of another or changed record was transmitted by the clerk of the district court to the clerk of this court, with a request that he file the same as the record in the case. The changes made in it, so far as can now be ascertained, were the removal of the cover, with the file-marks of the clerk of this court thereon, and the substitution of another; a rearrangement of it in certain particulars, and the incorporation in it of a certificate of the trial judge settling the bill of exceptions, and the notices of appeal, besides the addition of an entirely new certificate of the clerk of the district court, bearing date more than a month later than the file-marks of the clerk of this court. The clerk refused to file this document. Thereupon the motion to dismiss was filed by the attorney general. As soon as they were notified of the motion, counsel for appellant filed a suggestion of diminution of the record, and asked for an order directing the clerk of the district court to correct the defects and supply the omissions. It is not now within the power of this court to grant this order, because counsel have not returned the record taken from the custody of the clerk. Upon their own showing they cannot now do so, because its identity has been destroyed. The clerk was clearly right in refusing to file the new document presented to him, for it is not the record which counsel took from his custody, nor is it a substitute for the original made by authority of the court. It is in fact no record at all, nor is there now on file any record in the case which this court can correct. It is not clear who is to blame for the condition presented—whether counsel for appellant or the clerk of the district court; but counsel are responsible, because but for their action the integrity of the record would have been preserved,

and they and their client must bear the consequences. Counsel took the record away. They were responsible for its return in the same condition as when they got it. Though the clerk of the district court assumes sole responsibility for the present condition, counsel should have brought the matter to the attention of this court, and asked that the record be restored or substituted. Instead of doing this, they contented themselves by allowing the clerk of the district court to lodge the new document with the clerk of this court, and leaving it with him until necessity to do something was made urgent by the motion to dismiss.

This court has been exceedingly liberal in permitting amendments, but it cannot recognize the practice pursued in this case, for the reason that, if permitted, it would lead to the utmost confusion and uncertainty. In such cases we may not stop to inquire whether the particular offense has proceeded from ignorance or a willful disregard of propriety, but will follow the course adopted by this court in *McDonald v. Shreve*, 12 Mont. 82, 29 Pac. 729, and dismiss the appeals. The appeals are accordingly dismissed.

Dismissed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Motion for reinstatement of appeals denied June 16, 1905.

32	498
133	28
32	498
41	205

AYOTTE, RESPONDENT, v. NADEAU, APPELLANT.

(No. 2,101.)

(Submitted May 3, 1905. Decided June 17, 1905.)

Tenants in Common—Rights Inter Sese—Statutes—Construction—Accounting—Complaint—Sufficiency—Action for Rent—Pleadings—Theory of Case—Burden of Proof—Statute of Frauds.

Appeal—Questions for Review.

1. Rulings of the trial court made prior to trial are reviewable on appeal from the judgment.

Pleadings—Sufficiency—Appeal—Question for Review.

2. Where, at the outset of the trial, the sufficiency of a pleading is challenged by objection to the introduction of evidence by the opposing party, on the ground of want of substantial allegations therein, the question thus presented is reviewable on appeal from an order denying a new trial.

Complaint—Improper Joinder of Causes of Action—Waiver.

3. Where defendant failed to object to a complaint which blended two causes of action, contrary to the provisions of Code of Civil Procedure, section 672, the defect will be deemed to have been waived by such failure to object.

Tenants in Common—Rights *Inter Sese*—Common-law Rule.

4. Neither the common-law rule, that, where one cotenant occupies the common property and takes the whole profit, the other has no cause of action against him unless the acts of the occupant amount to an ouster, or unless the occupancy was under an agreement by which the occupant became bailiff for the other as to his share, nor the rule laid down by the statute of Anne (4 & 5 Anne, chapter 16), that where one cotenant receives more than his share of the rents and profits of the common property, he is liable to account to the other therefor, is in force in Montana.

Tenants in Common—Statutes—Construction.

5. The Act of 1899 (Session Laws 1899, p. 134), amending Code of Civil Procedure, 1895, section 592, in the form of limitations and provisos affecting the substantial rights of tenants in common in the common property, is inapplicable to a cotenancy created prior to its passage.

Actions—Character—How Determined.

6. The character of an action—whether one at law or in equity—must be determined by the kind of relief which the pleadings of a party entitle him to.

Tenants in Common—Action by One Against the Other—When Maintainable.

7. Under Code of Civil Procedure, section 592, an action for the reasonable value of the use and occupation of a city lot is maintainable by one cotenant against another as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one cotenant, or from a profitable use of the common property by the cotenant himself.

Accounting—Complaint—Sufficiency.

8. A complaint containing no allegation of a demand for a general accounting and a refusal by defendant, states no cause of action for an accounting.

Tenants in Common—Use of Property—Contract.

9. Tenants in common may contract with reference to the use of the common property, since their respective interests in it partake in great measure of estates in severalty.

Tenants in Common—Contracts—Consideration.

10. The exclusive use of a building on the common property by one cotenant is a sufficient consideration to support his promise to the other to pay rent therefor at a stipulated rate.

Tenants in Common—Action for Rents—Complaint—Sufficiency.

11. A complaint by a tenant in common against his cotenant alleged the making of a contract between the plaintiff and defendant whereby the latter was to erect a building on the common property at his own expense, and that, when the rents received by defendant were equal to one-half the cost of the building, the rents were to be equally divided between them, and that the rents received by the defendant therefrom were in excess of one-half the cost of the building, but that the defendant refused to account to plaintiff for his share. *Held*, that the complaint stated a cause of action for rents due under the contract, in view of Code of Civil Procedure, section 502, providing that, if any person shall assume and exercise exclusive ownership over any property held in common, the party aggrieved shall have his action for the injury.

Action by One Tenant in Common Against the Other—Rent—Scope of Action.

12. In an action at law by one cotenant against another for rents collected and retained by the defendant for the use of a building on the common property, the interests of the parties in the building itself cannot be adjudicated, an action in ejectment being required for that purpose.

Theory of Case—Appeal—Instructions.

13. Where a cause was tried in the district court as one at law, a general verdict had and a judgment entered for plaintiff, he, on defendant's appeal, cannot change his ground in the supreme court and insist that the cause was one in equity, and that therefore error in giving or refusing instructions is not ground for reversal.

Tenants in Common—Action for Rents—Burden of Proof—Instructions.

14. In an action by a tenant in common against his cotenant for rents alleged to be due to the plaintiff under a contract for the erection of a building at defendant's expense, and an equal division of rents after defendant was reimbursed by receipts of rent therefrom to the extent of one-half the cost, the burden was on plaintiff to show that defendant had been so reimbursed, and an instruction casting the burden upon defendant to show by a clear preponderance of the evidence that the building cost more than the amount alleged by plaintiff was prejudicial error.

Tenants in Common—Action for Rents—Contract—Statute of Frauds.

15. A contract between tenants in common for the erection of a house on the common property by one at his own expense, and requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, is not within Civil Code, section 2340, providing that certain contracts for the sale of personal property shall not be enforceable unless in writing, nor within section 2342 of the same code, making the same provision in relation to contracts for the sale of land or any interest therein.

Tenants in Common—Action for Rents—Statute of Frauds.

16. Where a contract between plaintiff and defendant as tenants in common provided for the erection of a house on the common property by defendant at his own expense, requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, and there was an immediate performance by plaintiff by his surrender to defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent should pay for the erection of the building, the contract was enforceable irrespective of the Civil Code, section 2185, subdivision 1,

which provides that an agreement not to be performed within a year is invalid unless in writing, such subdivision 1 being applicable to those contracts only which *by their terms* are not to be performed within one year by *either party*.

Tenants in Common—Action for Rents—Contracts—Statute of Frauds.

17. A contract between tenants in common for the erection of a house on the common property by one of them at his own expense, and requiring him to make an equal division of the rents when the rents received equaled one-half the cost, is not a contract of leasing within Civil Code, section 2185, subdivision 5, providing that an agreement for the leasing of real property for a longer period than one year is invalid unless in writing.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Samuel Ayotte against Peter Nadeau. From an order denying a new trial, defendant appeals. Reversed.

**STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.**

This action was brought by plaintiff to recover a judgment declaring him entitled to an undivided one-half interest in a certain building erected by the defendant upon a portion of a parcel or lot of land owned by the parties as tenants in common, and situate in Butte, Silver Bow county, as well as one-half of the rents already accrued and to accrue for its use. Judgment is also sought for one-half of the reasonable value of the use and occupation of other portions of the common property by the defendant and his tenants. The common property is described as a lot, one hundred and seventy-two by fifty-six feet, fronting on the south side of Park street in said city.

It is alleged, in substance, that on or about January 1, 1897, the defendant entered upon the northerly portion of said lot, and constructed a frame building thereon, to be used for the purpose of conducting a saloon business, and that it has been and still is used for that purpose; that it was erected by the defendant under an agreement between the plaintiff and defendant, by the terms of which the defendant agreed that plaintiff should receive a credit of \$10 per month for the use of his interest in the ground occupied by the building, to be

applied on the cost of its construction, and that, whenever the sum of such credits should equal one-half of the cost of construction, from that time the plaintiff should receive one-half of the rent of the building and be the owner of a half interest therein; that the cost of construction did not exceed \$500; that since February 1, 1899, the defendant has been renting the building for a monthly rental of \$75, and collecting the same and converting it to his own use; and that he has refused and still refuses to account to the plaintiff for his share, or \$37.50, per month, though repeated demands have been made upon him by the plaintiff to do so.

It is further alleged that on or about January 1, 1898, the defendant entered upon another portion of said lot toward the north, and erected and constructed thereon another building, which he occupied and still occupies exclusively as a residence; that this building was erected without the consent of the plaintiff; that the defendant, though often requested, has refused and still refuses to pay the plaintiff for the reasonable use and occupation of his interest in the ground occupied by said building, which is \$10 per month; that plaintiff is the owner of two small buildings situate on the southerly portion of said lot, one of which he occupies as a residence, and the other he rents to tenants, but that plaintiff has always been, and still is, ready and willing to account for and pay to the defendant his share of the reasonable value of the use of that portion of the lot occupied by these buildings; that there are a blacksmith-shop and a stable upon the central portion of said lot, which the plaintiff and defendant jointly rent to tenants, dividing the rents equally between them, but that the property in the possession of the defendant is claimed by him absolutely, he asserting the right to collect the rents thereof and reserve them to his own use.

It is further alleged, by way of amendment and supplement to the complaint, that since the bringing of this action the defendant has entered upon the eastern portion of said lot and erected thereon a building which he has used for his own profit

and has rented to different persons, collecting and appropriating the rent thereof to his own use and benefit; that the use of such portion of the lot since the erection of said building has been of the reasonable value of \$10 per month, but that defendant has paid plaintiff no part thereof. Demand is made that the plaintiff have judgment that he is the owner of a one-half interest in the saloon building, and that he recover one-half of the rents of the same, and that by the final judgment the rents of all the property be divided equally between the plaintiff and defendant.

The defendant admits the tenancy in common in the lot described; that on or about January 1, 1897, he entered thereon and erected the saloon building as alleged, and for the purpose alleged; that he has refused to pay to the plaintiff the share in the rents thereof for which he alleges a claim, for the reason that the same was erected at defendant's own expense, and that the plaintiff has no interest therein; that on or about January 1, 1898, the defendant entered upon another portion of the lot on the north end thereof and erected a residence, which he has still in his exclusive possession; that he refuses to pay the plaintiff, or any other person, the sum of \$10 per month, or any other sum, as rent for the ground occupied by this building; that there is a blacksmith-shop and stable on the central portion of the lot, but averring that the defendant occupies the same under an agreement made with the plaintiff at the time the saloon building was erected; and that there is a building on the eastern portion of the lot which has been used by defendant for his own purposes and rented to other persons, the rents therefor being collected and used as his own. He denies that he erected the saloon building under the agreement alleged in the complaint, or any agreement, or that he has collected rent therefor to exceed the sum of \$50 per month, or that the cost of erection was not to exceed \$500, and alleges such cost to have been \$1,000 or thereabouts; that the reasonable value of the land occupied by his residence is \$10, or any other or greater sum than \$2.50, per month; and that the value of the

rent for the ground occupied by the building on the eastern portion of the lot is \$10, or any greater sum than \$1, per month.

It is alleged affirmatively that the said buildings were erected on the lot with the knowledge and approval and consent of the plaintiff and that it was agreed that plaintiff should neither have nor claim any interest therein or rents or profits thereof; that relying upon the promise of the plaintiff not to charge him any rent for his, plaintiff's, interest in said ground other than the sum of \$10 per month, which the defendant agreed to pay plaintiff for his interest in the ground occupied by the stable and blacksmith-shop and certain other portions thereof, upon which defendant intended to build the saloon and residence referred to in the complaint, the defendant erected said buildings, it being mutually agreed that the defendant should not be required to pay any ground rent for the portions of the land occupied by them, except the sum of \$10, which it was agreed was all the rent the defendant should pay; and that it was further agreed that, in consideration of the fact that plaintiff should not claim any other rent than the \$10 so promised as aforesaid, the plaintiff should have free use and enjoyment of the portion of the joint property occupied by him. All other allegations of the complaint are denied generally. Issue is joined by replication upon the affirmative allegations of the answer.

The controversy was submitted to a jury, which rendered a general verdict for plaintiff for \$800, and judgment was entered accordingly. The defendant has appealed from an order denying him a new trial.

Mr. John J. McHatton, for Respondent.

To establish that the complaint states a cause of action; that there was no error in admitting evidence, and that the finding and verdict of the jury in this case should be sustained, we need only call attention to the statute and decisions: Code of Civil Proc., sec. 592, Laws Sixth Session, p. 134;

Anaconda Cop. Min. Co. v. Butte & Boston Min. Co., 17 Mont. 519, 43 Pac. 924; *Butte & Boston Con. Min. Co. v. Montana Ore Pur. Co.*, 25 Mont. 41, 63 Pac. 825; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Butte & Boston Con. Min. Co. v. Montana Ore. Pur. Co.*, 24 Mont. 125, 60 Pac. 1039. The exclusive occupation and use of the common property, or any part of it, constituted at common law an assertion of ownership, which would render the occupying cotenant responsible for rents or profits, use or occupation to the complaining cotenant, and amounted to an ouster, for which he could maintain his action. (See above case and cases cited, and *Byam v. Bickford*, 140 Mass. 31, 2 N. E. 687.) *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550, is relied upon by appellant. That case is explained and distinguished in *Goodenow v. Ewer*, 16 Cal. 461, 471, 76 Am. Dec. 540, and in *Abel v. Love*, 17 Cal. 233, 237. (See, also, *Howard v. Throckmorton*, 59 Cal. 79, 86.) Even where there is no ouster by one cotenant of another, he must account for rents received. (*Humphries v. Davis*, 100 Ind. 369; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571.) In the latter case, it is held that an occupant is not entitled to an allowance for expenditures made for his own convenience.

An action in equity is a proper remedy where one tenant has taken the rents and profits, or had the use and occupation of the common property to the exclusion of the other. (11 Am. & Eng. Ency. of Law, 1st ed., p. 1131, note 2; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, 21 S. E. 746, 29 L. R. A. 449; *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829.) Appellant was only entitled to make necessary repairs and improvements to protect the property without consulting the respondent. (*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Bateman v. Raymond*, 15 Mont. 439, 39 Pac. 520.) In an action to compel an accounting for ores removed, the defendant may be required to account for all ores removed. (*Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410; *McIntosh v. Perkins*, 13 Mont. 143, 32 Pac. 653; *Hagar v. Whitmore*, 82 Me. 248, 19 Atl. 444, 448.)

Whatever amounts to an exclusive claim or exclusive use and occupancy of a portion of the common property, amounts to an adverse claim or ouster; and where improvements are made upon property by a party in this position, he is entitled to no credit therefor, for between cotenants, contribution can be compelled only for necessary repairs. (*Stevens v. Thompson*, 17 N. H. 110; *Rico Red. & Min. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; 11 Am. & Eng. Ency. of Law, 1st ed., pp. 1104, 1105; Lindley on Mines, sec. 790, p. 989.) And when one cotenant disseises another, he cannot have contribution. (*Austin v. Barrett*, 44 Iowa, 488; *Mumford v. Brown*, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; *Doane v. Badger*, 12 Mass. 65; *Dech's Appeal*, 57 Pa. St. 467.) Wherever there has been an ouster, the cotenant ousted has his right, even under the common law, to an account for rent or for value of the use and occupation. (17 Am. & Eng. Ency. of Law, 2d ed., pp. 691, 694, and cases cited in notes.) In this case, so far as the portion of the common premises occupied by the appellant's residence is concerned, an ouster in fact is shown against the respondent.

The appellant had the burden of proof to show that the building cost more than \$500 and that his statement theretofore made to the respondent with reference to the cost of the same was not correct. The cost of the building was peculiarly within his own knowledge. The fact that he may not have possessed this knowledge does not change the rule, since he should have possessed it and could not shift the burden on the plaintiff. (Code of Civil Proc., sec. 3390, subd. 7.) A party claiming a credit or deduction must always establish the same. (*Colorado etc. Min. Co. v. Turck*, 70 Fed. 295; *St. Clair v. Cash Gold M. & M. Co.*, 9 Colo. App. 235, 47 Pac. 466; *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760; Lindley on Mines, sec. 868.) The circumstances placed the burden of proof on the defendant.

Mr. L. P. Forrestell, for Appellant.

Each tenant in common has the right to enter upon and hold exclusive possession of the common property, and to make such profit as he can by the proper cultivation or use thereof, and to retain the whole of the benefits derived from such cultivation or use, provided that, in keeping the possession and in making the profits, he has not been guilty of an ouster of his cotenant, or hindered him from entering upon the premises and enjoying them as he had a right to do. (Freeman on Cotenancy and Partition, secs. 258, 286, and cases cited; *Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Chapin v. Foss*, 75 Ill. 280; *Sconce v. Sconce*, 15 Ill. App. 169; *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *Sears v. Sellow*, 28 Iowa, 505; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. 151, 152; *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241; *Israel v. Israel*, 30 Md. 124, 96 Am. Dec. 571; *Boley v. Barutio*, 120 Ill. 192, 11 N. E. 393; *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *McCaw v. Barker*, 115 Ala. 543, 22 South. 131; *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218, 2 S. W. 705; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169, 17 Am. & Eng. Ency. of Law, 2d ed., 690, 699, and cases cited in notes thereto.) The assumption and exercise of exclusive ownership over common property means something more than the sole, silent occupation by one cotenant of the entire property. It means a denial of the title of his cotenant; an assumption of absolute ownership, which excludes the ownership of his companion; an adverse claim of sole and exclusive right by one against the other.

To say that the defendant had a right to enter upon, occupy and use the whole or any part of the common property, and without any showing whatever that plaintiff has been denied the right to do likewise, to charge defendant for use and occupation, is to assume that a wrong has been committed and to destroy the presumption which attaches to the possession of tenants in common, without any allegation and without any

evidence; it is equivalent to asserting that there is a remedy where there is no wrong. (*Alexander v. Kennedy*, 19 Tex 488, 70 Am. Dec. 358; *Prescott v. Veners*, 4 Mason, 326-331, Fed. Cas. No. 11,390; *Corwin v. Davidson*, 9 Cow. 24; *Peck v. Carpenter*, 7 Gray, 283, 66 Am. Dec. 477; *Izard v. Bodine*, 9 N. J. Eq. 309; *Sargent v. Parsons*, 12 Mass. 149; *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *Holmes v. Williams*, 16 Minn. 164; *Woolever v. Knapp*, 18 Barb. 265; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169; *Burns v. Byrne*, 45 Iowa, 287; *Belknap v. Belknap*, 77 Iowa, 71, 41 N. W. 568; *Lawton v. Adams*, 29 Ga. 273, 74 Am. Dec. 59; *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218, 2 S. W. 705; *Sailer v. Sailer*, 41 N. J. Eq. 398, 5 Atl. 319; *Hause v. Hause*, 29 Minn. 252, 13 N. W. 43; *Rich v. Rich*, 50 Hun, 199, 2 N. Y. Supp. 770; *Busch v. Huston*, 75 Ill. 343; *Clymer v. Dawkins*, 44 U. S. (3 How.) 674, 11 L. Ed. 778; *Cooley v. Porter*, 22 W. Va. 120; *Challefaux v. Ducharme*, 4 Wis. 554; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796; *Todd v. Todd*, 117 Ill. 92, 7 N. E. 583; *Swartwout v. Evans*, 37 Ill. 442; *Small v. Clif-ford*, 38 Me. 213.)

An action for "use and occupation of real property" cannot be predicated upon an entry without the consent of the plaintiff, from such an entry there can be no implication of a contract to pay rent, and the relation of landlord and tenant will not be implied from mere occupation, or a holding without the consent of the plaintiff. (*Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 599, and cases cited; Gear on Landlord and Tenant, sec. 150, p. 561; also footnote No. 28 to same; 1 Boone on Real Property, sec. 110, p. 291; *Smith v. Stewart*, 6 Johns. 49, 5 Am. Dec. 186; *Bancroft v. Wardell*, 13 Johns. 489, 7 Am. Dec. 396; *Edmonson v. Kite*, 43 Mo. 178; *McClosky v. Miller*, 72 Pa. St. 154; *Espy v. Fenton*, 5 Or. 423; *Lankford v. Green*, 52 Ala. 103; *Hathaway v. Ryan*, 35 Cal. 194; *Sampson v. Schaeffer*, 3 Cal. 196; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Lloyd v. Hough*, 1 How. 153, 11 L. Ed. 83; *Carpenter v. United States*, 17 Wall. 489,

21 L. Ed. 681; *Wiggins Ferry Co. v. Ohio & Miss. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1059; 1 Taylor's Landlord and Tenant, 8th ed., sec. 19; 1 Estey's Pleading, sec. 952.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

1. The contention is made by appellant that the complaint does not state a cause of action. Respondent argues that this contention presents a question which cannot be determined upon this appeal. The sufficiency of a pleading will not ordinarily be examined on the motion for a new trial, nor on appeal from an order disposing of it, because the motion presents for review only rulings made during the progress of the trial. Rulings made prior to trial are reviewable on appeal from the judgment. (*Scherrer v. Hale*, 9 Mont. 63, 22 Pac. 151; *Powder River Cattle Co. v. Commissioners of Custer Co.*, 9 Mont. 145, 22 Pac. 383.) An exception to this rule is recognized, however, when the sufficiency of the pleading is challenged during the progress of the trial by objection to the introduction of evidence on the ground of want of substantial allegations therein, or other appropriate method. (*Campbell v. Great Falls*, 27 Mont. 87, 69 Pac. 114; *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483; Hayne on New Trial and Appeal, sec. 1; Spelling on New Trial and Appellate Practice, sec. 388.) At the outset of the trial of this case appellant objected to the introduction of evidence by the plaintiff on the ground that the complaint does not state a cause of action; the court overruled the objection; the appellant brings himself within the recognized exception, and is entitled to the judgment of this court upon the correctness of this ruling.

The complaint presents a double aspect. In the first portion of it plaintiff seeks to recover on an express contract, under the terms of which there is alleged to be due him the sum of \$37.50 per month since February 1, 1899. He also asks

to be declared the owner of one-half of the saloon building. Then follow allegations setting forth, as ground for additional recovery, the occupation and use by defendant of the other portions of the common property without consent of the plaintiff. Two causes of action are therefore blended, whereas they should have been separately stated. (Code of Civil Proc., sec. 672.) No objection was made to the pleadings on this ground, however, and this feature of it may be passed without further notice.

The objections upon which appellant relies are, that there is alleged no agreement by defendant to pay rent, nor any statement of facts from which it appears that defendant has ousted the plaintiff, or has assumed and exercised exclusive ownership over, or has destroyed, lessened in value, or otherwise injured the common property so as to give the plaintiff any ground of action, and that no demand for an accounting is alleged.

The respondent in his brief designates this action as one in equity for an accounting. This designation does not determine its character. This must be determined by the kind of relief to which the allegations show him to be entitled. Passing for a moment the allegations touching the express contract with reference to the saloon building, the question arises: Under what circumstances may one cotenant maintain an action against one or more of his cotenants for an accounting for the use and occupation of the real estate owned in common?

The rule at the common law was that, where one cotenant occupied the common property and took the whole profit, the other had no cause of action against him unless the acts of the occupant amounted to an ouster of his companion, or unless the occupant held under an agreement by which he became bailiff for the other as to his share. In the one case, ejectment lay in favor of the ousted cotenant to admit him into joint possession; in the other, he had his action of account for his share of the rents and profits, just as against a bailiff in charge of an estate which the plaintiff owned in the entirety. The lack of any suitable means of redress, when one cotenant had received

more than his share of the rents and profits, led to the enactment of the statute of Anne (4 & 5 Anne, c. XVI.) Under its provisions, one cotenant became the bailiff of the other by receiving more than his share, and could be called to account; but, as interpreted by the courts of England, he could be held to account only when he received more than his share from another person. When he occupied and cultivated the land himself, the products were held to be the fruits of his own industry, and he could not be made to account for any part of them. (*Henderson v. Eason*, 1 Eng. Rul. Cas. 449.) In other respects the common-law rule remained unchanged, and no action lay in favor of the cotenant not in possession, except when ousted, or when his cotenant held as bailiff. The reason for the rule was that each cotenant was entitled to the occupation of the premises. So long as the one did not exclude the other, he was free to possess and enjoy as he pleased, because his possession was but an exercise of a legal right. He could not be deprived of this legal right by the caprice or indolence of his cotenant. This the law did not tolerate, but rather lent support to the notion that when the one refused to occupy and enjoy he thereby, for the time, at least, relinquished all right to the other. (*Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Butte & Boston Con. M. Co. v. Montana Ore Pur. Co.*, 25 Mont. 41, 63 Pac. 825; *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218, 2 S. W. 705; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550; *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169; *Hause v. Hause*, 29 Minn. 252, 13 N. W. 43; *Humphries v. Davis*, 100 Ind. 369; Freeman on Cotenancy and Partition, sec. 258.)

Neither the statute of Anne nor the common-law rule is in force in this state. Section 2 of the Act of the territorial legislature of February 8, 1865 (Bannack Statutes 1864-65, p. 454), materially modified the rights and relations of cotenants *inter sese*, and this section, with slight modifications as to rem-

edies, was incorporated into the Code of Civil Procedure of 1895 as section 592. Amendments in the form of limitations and provisos were made to it by Act of the legislature of 1899 (Session Laws 1899, p. 134); but, as these affect the substantial rights of the parties touching the common property, a consideration of them is not now pertinent, since the cotenancy here involved was created prior to their passage. (*Butte & Boston Con. M. Co. v. Mont. Ore Pur. Co.*, 25 Mont. 41, 63 Pac. 825.) They have no application.

The question is whether the allegations of the complaint now under consideration state a case from any view of the law. The statute declares: "Sec. 592. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." This section has been considered several times by this court, and its application to cotenancies in mining property determined. (*Anaconda Copper M. Co. v. Butte & Boston M. Co.*, 17 Mont. 519, 43 Pac. 924; *Red Mountain Con. M. Co. v. Esler*, 18 Mont. 174, 44 Pac. 523; *Connole et al. v. Boston & Mont. Con. C. & S. M. Co.*, 20 Mont. 523, 52 Pac. 263; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Butte & Boston Con. M. Co. v. Montana Ore Pur. Co.*, 24 Mont. 125, 60 Pac. 1039; *Butte & Boston Con. M. Co. v. Montana Ore Pur. Co.*, 25 Mont. 41, 63 Pac. 825.) In the first three and the last one of these cases the court considered the character of the remedies which one cotenant of a mining claim could successfully invoke against another who was engaged in working it under circumstances showing the assumption and exercise of exclusive ownership amounting to an ouster, and held that the remedy of injunction was appropriate.

In *Harrigan v. Lynch* it was held that injunction would lie to prevent one cotenant from working the common property without the consent of the other, where he was removing ore

and using the proceeds of it to pay obligations incurred in his operations, without reference to whether the operations were profitable or enhanced the value of the claim, thus distinctly recognizing the rule that the statute renders it unlawful for one cotenant in mining property to occupy and work it, though the circumstances do not tend to show an ouster; in other words, the nonconsenting cotenant is entitled, if he so wishes, to have the property stand in its entirety until such time as there may be a partition among the parties entitled. In the last case the history, scope and purpose of the Act of 1865 was considered and determined, and the general effect of it stated. After giving a history of the legislation, and pointing out its evident purpose, this court said: "In view of this plain purpose declared in unmistakable terms in the Act, in view of the fact that this purpose could be accomplished only by modifying the relations incident to cotenancy and creating new rights in the cotenants, and in view of the avowed object of the statute as declared in its title, the conclusion cannot be escaped that the legislative assembly clearly intended by this awkwardly worded section to alter substantially the rights of cotenants, make violations of those rights constitute legal injuries, and designate the appropriate remedies for such injuries." And again: "We are of the opinion that the purpose of this section was to destroy those characteristics of tenancies in common wherein they mainly differ from holdings in severalty, leaving the necessity for voluntary or judicial partition as the chief remnant of the distinguishing features of this species of ownership; in other words, the first and second sections, which concern 'Joint Rights,' practically convert a joint tenancy into a tenancy in common, and then convert tenancy in common into an estate with many (whether with all, we need not decide) of the rights and privileges incident to several ownership, and giving the actions of trespass and trover for their protection."

The effect of this change worked by the statute in the common law is further stated as follows: "For one cotenant without the consent of the other to mine and remove ore from the

common property is an unauthorized taking away and lessening in value of the property within the meaning of the act of 1865; it is a permanent injury thereto (*Murray et al. v. Haverly et al.*, 70 Ill. 318; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642), and the principle declared in the act of 1865, at least as respects cotenancies in quartz and placer mining claims, is that the common property shall remain an entirety until partition, and that no one of the owners may, without the consent of the other owners, work it or lessen its value by mining and removing the ore deposits."

Mining property differs from farm and city property in the important particular that the former is consumed by the appropriate use of it. Nevertheless, at the common law, open mines could be worked by one cotenant, who would reserve the proceeds to himself as the fruits of his own industry, without being subject to be called to account by his cotenant, so long as he did nothing amounting to an ouster or unlawful destruction of the common property. In other words, the result of these decisions is that that which was lawful for one cotenant to do with respect to mining property at the common law was, by the provisions of the act of 1865, rendered unlawful, so that his cotenant, not consenting to his act, can call him to account in the appropriate form of action; section 592, *supra*, having wrought no change except as to remedies, the scope and effect of it are the same. If this be the proper construction of the act so far as it affects mining property—and we do not see how the conclusion of this court in this regard could have been avoided—it results that, wherever one cotenant assumes and exercises acts of exclusive ownership over agricultural or city property, the same rule applies, for, to the extent that he uses the entire property as his own, to the same extent does he use the interest of his cotenant as his own.

So that, if one cotenant of a farm or of a city lot should enter into possession of it and enjoy it as his own property, he can be held accountable by his cotenant for the mere use and occupation of it; and for a much stronger reason would the

occupying cotenant become liable to an accounting at the suit of the nonoccupying cotenant where the former rents out the property to tenants and collects and appropriates the revenues from it to his own use. In such case the use of the property by the one of the cotenants would be the assumption and the exercise of the exclusive ownership over it, and his cotenant would be a party aggrieved within the meaning of the statute. For, what was lawful use of the common property at the common law in the case of mining property having been made unlawful by the statute, what was lawful use of farm or city property must be, by the same rule, deemed to be unlawful.

The general effect of the statute, then, is that, though one cotenant may not be guilty of a trespass when he enters upon the common property in order to protect and preserve it, yet if he occupies and uses it, or any part of it, as his own without the consent of his cotenant, he so far assumes and exercises exclusive ownership over it that he may be held to account in the proper action by his cotenant; and thus the necessity for voluntary or judicial partition is left as not the chief, but the only, distinguishing feature of this species of ownership, except, perhaps, the duties and liabilities of the cotenants with reference to the protection and preservation of the common title. So that an action for the reasonable value of the occupation and use may therefore be maintained by one cotenant against the other, at least as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one cotenant, or from profitable use by the cotenant himself. The occupant becomes the bailiff for his cotenant, and may be charged as such.

The complaint contains no allegation of a demand for a general accounting and a refusal by defendant. This is a necessary allegation. Without it, the action cannot be sustained as one for an accounting. (*Wetzstein v. Boston & Mon. Con. C. & S. M. Co.*, 28 Mont. 451, 72 Pac. 865.) The statute does not prescribe the form of action which may be resorted to, but leaves the plaintiff to select the one most appro-

priate. Whatever that may be, the allegations of the complaint must fulfill the requirements of the rules of pleading applicable. While this is true, there is sufficient substantial allegation to sustain the action for the recovery of rents due under the contract alleged with reference to the saloon building.

Tenants in common may contract with reference to the use of the common property. This is particularly the case under the statute, since their respective interests partake in great measure of the nature of estates in severalty. The exclusive use by one is a sufficient consideration to support his promise to pay rent at a stipulated rate. The objections to the introduction of evidence being general, and not directed to any particular allegation or paragraph of the pleading, the action of the court in overruling them was correct.

That the action is one at law is manifest, since it proceeds upon a contract and seeks recovery for a breach. In so far as the prayer asks for an adjudication of the interests of the parties in the building itself, relief may not be had in this action; for, while the result of a judgment in plaintiff's favor for a breach of the contract would indirectly adjudicate these interests, an action in ejectment would be required to determine them directly.

2. Contention is made that the court erred to the prejudice of the defendant in giving and refusing instructions. Respondent insists that the instructions may not be examined because the case is one in equity, and invokes the rule that error in giving or refusing instructions is not ground for reversal. What has heretofore been said disposes of respondent's contention. Appellant was entitled to a trial by jury as a matter of right, and the alleged errors touching the instructions are properly before this court for review. Furthermore, the cause was tried in the district court as one at law, a general verdict was had, and judgment entered thereon. It is too late now for respondent to change his ground and insist upon a different theory of the case from that upon which it proceeded in

the trial court. (*Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, and cases cited.)

Upon the burden of proof touching the contract, the district court instructed the jury as follows: "You are instructed that in defendant's answer he denies the allegation of plaintiff's complaint that the saloon building in controversy in this action was erected and constructed by him at a cost not to exceed \$500, and 'avers that said building was erected and constructed at a cost to defendant of \$1,000 or thereabouts.' In this connection, you are instructed that the burden of proof is upon the defendant to establish the cost of said building, and to establish it by satisfactory evidence, as he is in possession of a knowledge of the amount of the cost of said building; and if weaker or less satisfactory evidence than the defendant could have offered is offered in this case, and if it appears that stronger or more satisfactory evidence was within his power, and could have been offered had he so desired, you are instructed to view the weaker evidence with distrust."

The burden was upon the plaintiff to establish the contract as well as the breach of it. Otherwise he could not recover. It therefore devolved upon him, after *prima facie* proof of the contract, to show that the building cost not to exceed the sum stated, or such other sum, though greater, as had already been discharged by the rents already accrued at the rate of \$20 per month; in other words, the answer put in issue the allegations of the complaint, and the burden was on the plaintiff to show that the defendant had been reimbursed for one-half of the cost of construction by the plaintiff's share of the accrued rents. This was necessary, otherwise no breach of the contract was shown. When this appeared by *prima facie* proof, the burden shifted to the defendant to rebut it. This he might do by evidence tending to show that no such contract was made, or that the building cost more than the plaintiff's evidence tended to show, and that the plaintiff was therefore entitled to recover nothing, because the defendant had not yet been reimbursed; or, further, that, though something might be due under the

contract, still it was much less than the sum claimed. An equipoise in the evidence upon any of these points would have been to defendant's advantage.

The instruction, therefore, is open to the criticism made by appellant as being prejudicial. It virtually said to the jury: "If the evidence satisfies you that the plaintiff and defendant entered into the contract alleged, the plaintiff is entitled to recover the amount claimed, unless the defendant satisfies you by a clear preponderance of the evidence that the building cost more than the amount alleged by plaintiff"; whereas the plaintiff could not recover without making at least *prima facie* proof of each material allegation of his pleading. Whether the circumstances were such as to warrant the direction to the jury to distrust defendant's evidence, on the ground that he had not presented other and more satisfactory evidence than he did, is a question not before us, as no criticism is offered on that ground. For the error in this instruction, a new trial must be granted.

It will not be necessary to examine in detail the other instructions given or refused. What has already been said disposes of the contention of the parties with reference to them. It may be said generally that some of those given speak of the property in controversy as though the title to the whole lot of land were in dispute, whereas the only issues properly before the court were as to the right to recover on the contract. Upon another trial these references should be omitted, as they are likely to confuse the jury by directing attention to a matter assumed to be at issue in the case, whereas in fact it is not. That plaintiff and defendant were tenants in common was not in dispute.

3. Many errors are assigned upon rulings of the court in admitting and excluding evidence. We shall notice only two of these. On cross-examination of the plaintiff, counsel for defendant asked him if the contract with reference to the saloon building, or any note or memorandum of it, was in writing. Upon objection, the evidence sought was excluded. The ap-

parent purpose of the question was to bring out evidence showing that the contract was oral, and therefore void under the provisions of sections 2340, 2342 and 2185 of the Civil Code. This point is made by appellant, and also the point that, even if the provisions of the statute do not apply, the question was proper as reflecting light upon the real controversy, and that the right of cross-examination was by the ruling unnecessarily restricted. The question was not at all pertinent, unless the evidence was intended to show that the contract was within the statute. It did not upon any other theory seek evidence that would in any wise contradict or impeach the plaintiff or shed any light upon the issues before the court. Its pertinency depends upon whether the contract, if oral, falls within the rule of the sections cited.

Sections 2340 and 2342 have no application. The first has reference to contracts for the sale of personal property. Under the contract alleged, there was no agreement for the sale of the building. It was an agreement by the defendant to erect the building upon the joint property, at the cost of both tenants, in consideration for which he was not to account until reimbursed from the proceeds of the rent at the stipulated rate, whereupon he was to account to the plaintiff for his share. For a like reason, section 2342 has no application. There was no contract for the sale of land, nor for any interest therein.

Section 2185 declares that "an agreement that by its terms is not to be performed within a year from the making thereof is invalid," unless it be in writing and subscribed by the party to be charged, or his agent. (Subdivision 1.) It also declares that "an agreement for the leasing for a longer period than one year" is invalid, unless it is executed with like formalities. (Subdivision 5.) Subdivision 1, *supra*, is applicable to those contracts only which *by their terms* are not to be performed within one year by either of the parties. Therefore, where a contract may be performed by one of the parties within one year, the statute does not apply, especially so where the performance has been fully carried out. Though there is

some difference in the views of the courts upon this point, the rule is supported by the weight of authority, both in this country and in England. "The meaning of the section is that no action shall be brought to recover damages in respect of the nonperformance of such contracts as are referred to in it; its design was to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, and for that purpose it requires that certain contracts shall be evidenced only by the solemnity of writing, and has no application to actions founded upon an executed consideration." (Wood on the Statute of Frauds, sec. 279.) The text is supported by the following cases: *Donellan v. Read*, 3 Barn. & Adol. 899; 37 Eng. Rev. Rep. 588; *Boydell v. Drummond*, 11 East, 142; *Dougherty v. Rosenberg*, 62 Cal. 32; *Horner and Congdon Executors v. Frazier*, 65 Md. 1, 4 Atl. 133; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Sugett's Admr. v. Cason's Admr.*, 26 Mo. 221; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Zabel v. Schroeder*, 35 Tex. 308; *Perkins v. Clay*, 54 N. H. 518; *Crocker v. Higgins*, 7 Conn. 342; *Chittington v. Fowler*, 2 Root (Conn.), 387; *Pinney v. Pinney*, 2 Root (Conn.), 191; *Berry v. Doremus*, 30 N. J. L. 399; *Holloway v. Hampton*, 4 Mon. 415; *Wolke v. Fleming*, 103 Ind. 105. 53 Am. Rep. 495, 2 N. E. 325; *McClellan v. Sanford*, 26 Wis. 595.

The complaint alleges, not directly, indeed, but in substance, a full and immediate performance on the part of the plaintiff by his surrender to the defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent should pay for the erection of the building together with the use of the property in the meantime by the defendant for the purposes of revenue under the agreement. The exclusive use and control is admitted by the defendant. Under these circumstances, the inquiry whether the contract was in writing was wholly an immaterial one.

Nor does subdivision 5 of the Act apply. The arrangement

between the parties did not amount to a contract for a leasing by the one party to the other. The purpose of the contract was to make profitable property which up to the time of the agreement had yielded little or no revenue. While the arrangement did not preclude the defendant from occupying the building himself and conducting a business therein, yet it seems clear that it was the intention of the parties, as manifested by plaintiff's allegations, that after its erection it should be rented to other persons, and the revenue derived therefrom, after the defendant had been fully reimbursed, equally divided between the parties, the question to be decided being, had the defendant on his part violated the agreement for failure to pay plaintiff his share?

The court admitted, over the objection of the defendant, evidence of the reasonable value of the portion of the lot occupied by defendant's residence. Under the view already stated as to the sufficiency of the complaint to state a cause of action for an accounting, this was error.

4. Considerable parts of the briefs are devoted to a discussion of the insufficiency of the evidence. It is not necessary or proper to discuss this phase of the case, beyond stating that there is no conflict touching defendant's control and use of part of the alleged property. The entire controversy turns upon whether there was a breach of the contract. The defendant contends that he was occupying it under an agreement by which he was to pay the plaintiff \$10 per month for the use of all of the lot except the portion occupied by the plaintiff, this portion the plaintiff being allowed to occupy without accounting for any rent. The evidence on this issue is in conflict, and the court was justified in submitting it to the jury.

The court should have granted a new trial. Accordingly, the order is reversed, and the cause is remanded with directions that a new trial be granted.

Reversed and remanded.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Rehearing denied July 29, 1905.

MAY, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
COMPANY, APPELLANT.

(No. 2,102.)

(Submitted May 4, 1905. Decided July 3, 1905.)

Personal Injuries—Compulsory Physical Examination—Physicians and Surgeons—Witnesses—Privileged Communications—Waiver of Privilege.

Personal Injuries—Compulsory Physical Examination—Physicians and Surgeons.

1. In an action for personal injuries, the district court, in the absence of legislation, may not compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court.

Witnesses—Privileged Communications—Physicians—Waiver of Privilege.

2. Under Code of Civil Procedure, section 3163, providing that a licensed physician or surgeon, without his patient's consent, cannot be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe, where plaintiff on cross-examination admitted that a certain physician had attended and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her.

Appeal from District Court, Ravalli County; F. C. Webster, Judge.

ACTION by Mary May against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying its motion for a new trial, defendant appeals. Affirmed.

Mr. Wm. Wallace and Mr. Charles Donnelly, for Appellant.

The admission of the testimony of the physician is not positively forbidden by this statute. The patient may consent to its admission. The statute simply confers a privilege upon the patient, and this privilege, under all the authorities may be waived. What constitutes a waiver of it? We contend that when a plaintiff goes upon the stand as did the plaintiff in this case, and freely and voluntarily makes a disclosure of all of the facts and circumstances concerning which the physician is asked to testify, the privilege has been waived and the patient may no longer object to the introduction of the testi-

mony. (*Lane v. Bricourt*, 128 Ind. 420, 25 Am. St. Rep. 442, 27 N. E. 1111; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000; *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 89 Am. St. Rep. 359, 86 N. W. 307, 54 L. R. A. 364; *Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488, 9 Sup. Ct. 125; *McKinney v. Grand St. Ry. Co.*, 104 N. Y. 352, 10 N. E. 544; *People v. Schuyler*, 12 N. E. 783, 106 N. Y. 306; *Morris v. New York etc. Ry. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410; *Marx v. Manhattan Ry. Co.*, 56 Hun, 575, 10 N. Y. Supp. 159; *Treanor v. Manhattan Ry. Co.*, 16 N. Y. Supp. 536, 21 Civ. Proc. Rep. 364; *Webb v. Metropolitan St. Ry. Co.*, 89 Mo. App. 604; *Highfill v. Missouri Pac. Ry. Co.*, 93 Mo. App. 219.)

Mr. H. L. Myers, and *Mr. R. A. O'Hara*, for Respondent.

It was plaintiff's privilege to exclude Dr. McGrath's evidence and she did not have to give her reasons for it. There may have been in her mind many valid reasons for so doing. Dr. McGrath had been superseded by Dr. Brethour. There may have been feeling of enmity or unpleasantness on that account. Plaintiff may have felt that Dr. McGrath was inimical to her or displeased because he had been superseded by Dr. Brethour. She may have felt that Dr. McGrath was hurried and did not examine her thoroughly. Or it may have been because Dr. McGrath was the local railroad surgeon and in the employ of the defendant. The law does not require her to give her reasons. It is enough that she objects and claims a right ripened by time and universally recognized. Most of the cases here cited involve the question of waiver by plaintiff testifying in his or her own behalf fully and producing the evidence of one or more physicians to the exclusion of others. They all hold in our favor. (*Citizens' Ry. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765; *Munz v. Salt Lake City Ry. Co.*, 25 Utah, 220, 70 Pac. 852; *Green v. Town of Nebagmain*, 113 Wis. 508, 89 N. W. 520; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771; *Dunckle v. McAllister*, 70 App. Div. 273, 74 N. Y. Supp. 902; *Metropolitan*

St. Ry. Co. v. Jacobi, 112 Fed. 924; *James v. Kansas City*, 85 Mo. App. 20; *Finnegan v. Sioux City*, 112 Iowa, 232, 83 N. W. 907; *Keist v. Chicago etc. Ry. Co.*, 110 Iowa, 32, 81 N. W. 181; *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790; *Dotton v. Albion Com. Council*, 57 Mich. 575, 24 N. W. 786; *Jones v. Brooklyn etc. Ry. Co.*, 121 N. Y. 683, 24 N. E. 1098; *Breisenmeister v. Supreme Lodge*, 81 Mich. 525, 45 N. W. 977; *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. 176; *Kling v. City of Kansas*, 27 Mo. App. 231; *Raymond v. Burlington etc. Ry. Co.*, 65 Iowa, 152, 21 N. W. 495; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330, 23 N. E. 973, 7 L. R. A. 687; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Williams v. Johnson*, 112 Ind. 600, 13 N. E. 872; *Feeney v. Long Island Ry. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1903, Mary May commenced this action against the Northern Pacific Railway Company to recover damages for personal injuries alleged to have been occasioned by the negligence of the agents and employees of the defendant company. The answer of defendant denies all the material allegations of the complaint. Prior to the date set for the trial of the cause the defendant company attempted, unsuccessfully, to induce the plaintiff to submit to a physical examination by surgeons selected by the company, presumably. Immediately prior to the trial the defendant made application to the court for an order compelling the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court. This application was denied.

The cause having been brought on for trial, and the plaintiff having testified as to the cause of her injuries and their nature and extent, and having produced Drs. Brethour and Buchen, her attending physicians, as witnesses in her behalf, upon cross-examination admitted that one Dr. McGrath had also attended her in the early stages of her illness as her physician.

The defendant in its behalf called Dr. McGrath, and asked him to state in what condition he found the plaintiff when he called upon her. This was objected to on the ground that it called for testimony from a physician concerning matters discovered by him while acting as physician for the plaintiff, and the giving of such testimony by Dr. McGrath would violate the confidential relation of physician and patient, contrary to the provisions of section 3163 of the Code of Civil Procedure. This objection was sustained, and exception taken. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon, and from an order denying defendant's motion for a new trial, it appealed.

Only two errors are assigned: (1) The order of the court denying defendant's application for an order compelling the plaintiff to submit to a physical examination, and (2) the order of the court sustaining an objection to the question asked Dr. McGrath. These will be considered in the order presented in the briefs.

1. Compulsory Physical Examination: May a district court in this state, in an action for personal injuries, compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court? Upon this question the authorities are in hopeless conflict, and any attempt to reconcile them would be barren of results.

The first reported case in which the power of the court to compel such examination is asserted is *Walsh v. Sayte*, 52 How. Pr. 334, decided by the New York superior court in 1868. This was an action for damages for malpractice, and upon the analogy to cases of mayhem, divorce on the ground of impotency, and cases of controversies between a widow, claiming to be pregnant by the decedent, and other heirs of the estate, wherein such examinations had been ordered, it was held that a court of law could compel the plaintiff to submit to a physical examination.

A leading case on the subject is *Schroeder v. Chicago Ry. Co.*, 47 Iowa, 375, decided in 1877. Mention is not made of the

New York case cited above. The opinion states that there were no precedents at the time of its rendition. The power of the trial court to compel the plaintiff to submit to such an examination is asserted.

In 1881 the same question came before the supreme court of Ohio, in *Miami etc. Turnpike Co. v. Baily*, 37 Ohio St. 104, and, upon the authority of the *Schroeder Case*, the power of the trial court to make and enforce such an order is again asserted.

The next case is *Atchison etc. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, decided in 1883, upon the authority of the *Schroeder Case* above, the court preferring to follow the Iowa court, rather than the supreme court of Missouri in *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509.

In November, 1884, in *White v. Milwaukee etc. Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524, the supreme court of Wisconsin decided the same question in the same way upon the authority of *Walsh v. Sayre* and the *Schroeder Case*.

In *Hatfield v. St. Paul etc. Ry. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176, decided in 1885, the power is asserted, but by way of *dictum*.

Richmond etc. R. R. Co. v. Childress, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, 3 L. R. A. 808, decided in 1889, is another case frequently referred to by courts holding this view. In the opening paragraph of the opinion in this case, section 206 of the Georgia Code is quoted, as follows: "Every court has power * * * to control in furtherance of justice the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter pertaining thereto." No further reference is made to this statute, but the power is asserted upon the authority of the cases herein considered above.

In November, 1885, in *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584, the same question is decided upon the authority of *Walsh v. Sayre*, the *Schroeder Case*, and the *White Case*; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Harrold v. New*

York etc. R. R. Co., 21 Hun, 268, and *Bryant v. Stilwell*, 24 Pa. 314, are also cited.

In *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A. 641, decided in 1893, the authorities for and against the assertion of the power are reviewed by the supreme court of Michigan, and a decision rendered in favor of the existence of the power in the trial court.

In *Belt E. L. Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89, decided in 1898, the same position is taken by the supreme court of Kentucky.

In 1899, in the supreme court of Washington, in *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367, 46 L. R. A. 153, a like decision was made.

The last state to assert this view is North Dakota, in *Brown v. Chicago etc. R. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, decided in 1903.

In 1873 the supreme court of Missouri, in *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509, had before it a personal injury case in which an application had been made to the trial court for an order to compel the plaintiff to submit to a physical examination. Respecting this application, the court said: "The proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries is unknown to our practice and to the law."

In 1882, in *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588, the supreme court of Illinois held that the trial court could not make or enforce such an order. In 1889, in *Kern v. Bridwell*, 119 Ind. 226, 12 Am. St. Rep. 409, 21 N. E. 664, the same conclusion was reached by the supreme court of Indiana.

In 1891 the question came before the supreme court of the United States in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, and, after a careful consideration of the authorities, it was held by a divided court—seven to two—that the power does not reside in the federal

trial courts. This was followed by the supreme court of Oklahoma in *City of Kingfisher v. Altizer*, 13 Okla. 121, 74 Pac. 107, by the court of civil appeals of Texas in *Austin etc. Ry. Co. v. Cluck* (Tex. Civ. App.), 73 S. W. 569, and by the supreme court of Massachusetts in *Stack v. New York etc. Ry. Co.* 177 Mass. 155, 83 Am. St. Rep. 269, 58 N. E. 686, 52 L. R. A. 328.

The foregoing review shows the decisions of courts upon the first presentation of this question to them. The case of *Walsh v. Sayre*, was followed in *Shaw v. Van Rensselaer*, above; but in 1891 the question came before the court of appeals of New York in *McQuigan v. Delaware etc. Ry. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, 29 N. E. 235, 14 L. R. A. 466, and *Walsh v. Sayre* and *Shaw v. Van Rensselaer* were overruled. The *McQuigan Case* was followed in *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, 53 N. E. 670, decided in 1899. The legislature of New York, however, circumvented the effect of these last decisions by enacting a statute directly conferring upon trial courts the power to make and enforce such an order.

In *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390, decided in 1885, a view contrary to that expressed in *Loyd's Case* is intimated by the supreme court of Missouri, and in *Sidekum v. Wabash etc. Ry. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701, a decision was rendered which had the effect of directly reversing the *Loyd Case*; and the *Sidekum Case* was followed in *Owens v. Kansas City etc. Ry. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350.

The *Schroeder Case* was followed by the supreme court of Iowa in *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; and *Railway Co. v. Thul* was approved and followed in *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, and again in *Atchison etc. Ry. Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90. *White v. Milwaukee Ry. Co.* was followed by the supreme court of Wisconsin in *O'Brien v. La Crosse*, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831. *Sibley*

v. *Smith*, above, was followed in *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

The supreme court of Indiana has been most uncertain in its treatment of the question. *Kern v. Bridwell*, above, was decided in May, 1889; but in November of the same year, in *Hess v. Lowery*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, 7 L. R. A. 90, a contrary doctrine is announced. In 1891, in *Pennsylvania R. R. Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, the announcement in *Hess v. Lowery* is pronounced *dictum*, and the authority is again distinctly denied. But the *Newmeyer Case* is distinctly reversed in *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396, and, so far as we are aware, the last decision from that court asserts the power.

Belt E. L. Co. v. Allen is affirmed in *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1, 45 S. W. 99, and in *Louisville etc. R. R. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733.

In *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851, 46 L. R. A. 448, decided in 1899, the *dictum* in the *Hatfield Case* is declared to be the law in Minnesota.

Parker v. Enslow is followed in *Peoria etc. Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951, and in *Pittsburgh etc. Ry. Co. v. Story*, 104 Ill. App. 132.

In *Railway Co. v. Underwood*, 64 Tex. 463, and *Missouri Pac. Railway Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, the court, without deciding, intimated that the trial courts in Texas had the power to compel such examination; but in *Austin etc. Ry. Co. v. Chuck* (Tex. Civ. App.), 73 S. W. 569, decided in 1903, the question is squarely met and decided, and the authority denied. This last case is affirmed, and the doctrine reannounced upon appeal to the supreme court of Texas, in *Austin etc. Ry. Co. v. Chuck* (Tex. Civ. App.), 77 S. W. 403, 64 L. R. A. 494.

The question has been before the supreme court of Nebraska, but not decided in *Sioux City etc. R. R. Co. v. Finlay-*

son, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860, in *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336, and *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62.

The syllabus to the decision in *Mills v. Railway Co.*, 1 Marv. (Del.) 269, 40 Atl. 1114, announces that the superior court of Delaware denies the power, but there is nothing in the body of the opinion with reference to the question.

The case of *Carrico v. West Virginia etc. R. R. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, is frequently cited in these opinions, but the question is not decided by the West Virginia court at all.

The federal and territorial courts have followed the decision in the *Botsford Case* in *Illinois Cent. Ry. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413, and in the *Oklahoma Case* cited.

If the last announcements of these several courts may be taken to indicate the law in their respective states, a review of the decisions discloses that the power of trial courts to compel such examination is asserted in Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Washington, and Wisconsin, and denied in the federal courts, and in Illinois, Massachusetts and Texas, and was denied in New York until specifically granted by direct legislative enactment.

The bare assertion that trial courts possess this power, in the absence of any legislation, and without common-law precedents, has led to the greatest possible confusion among the decisions of the very courts asserting it. (1) What is the source of the power? (2) To what extent may it be carried? (3) May the defendant demand the order as a matter of right? And (4) how will the court enforce obedience to its order? Singularly enough, the first of these questions appears to have received little or no consideration.

1. In *Railroad Co. v. Childress*, the section of the Georgia Code above is quoted; but further reference is not made to this

provision of the law, and it can hardly be presumed that the decision proceeds upon the assumption that the source of the power is the statute quoted. That section is similar in its provisions to subdivision 5 of section 110 of our Code of Civil Procedure. But that section adds nothing to the powers already possessed by courts of general jurisdiction, for it is merely declaratory of the common law. In some of the opinions it is said that the power is one inherent in the trial courts. In *Graves v. Battle Creek*, decided in 1893, it is said, "It is true that the rule is one of modern growth." Most of the courts content themselves with the bare assertion of the power, without any discussion of its origin.

2. If the plaintiff may be compelled to submit to a physical examination, is the authority to order it an absolute or only a qualified one? May the plaintiff be compelled to submit to the administration to him of anesthetics or drugs by which he loses consciousness altogether, or, if the injury is an internal one, may he be compelled to submit to the use of such surgical instruments as the physicians appointed to make the examination may see fit to use? May he be compelled to exhibit his injury to the jury in open court, and, if the plaintiff be a woman, is there any protection whatever against violence to her feelings?

By some of these courts it has been held that anesthetics and drugs should not be used (*Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616), and that plaintiff should not be compelled to submit to the use of surgical instruments (*O'Brien v. La Crosse*); but in *Railway Co. v. Palmore* it was held that the plaintiff could be compelled to submit to the examination, and to an injection of a drug into his injured eye to dilate the pupil; and in *Hall v. Manson* it was held that the plaintiff, a woman, could be compelled to remove her shoe and stocking, that an examination might be had and measurements taken of her injured ankle in the presence of the jury.

In *Alabama etc. Ry. Co. v. Hill*, above, the supreme court of Alabama said: "When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice on the other, the law cannot hesitate. Justice must be done." This is quoted with approval in *Lane v. Railway Co.* However, in *Graves v. Battle Creek* it is said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination * * * where the sense of delicacy of the plaintiff may be offended by the exhibition." To the same effect is the decision in *Ottawa v. Gilliland*, above.

3. In *Sibley v. Smith* and in *Railway Co. v. Thul* it is held that the defendant may demand the order as a matter of right, but that in granting it the court may exercise its discretion. We are unable to understand this contradiction of terms, and observe that in most of the cases it is held that the application is one addressed to the sound discretion of the trial court, subject to review for manifest abuse only.

4. In the *Schroeder Case* and in *Sibley v. Smith* it is said that refusal of the plaintiff to comply with the order would constitute contempt of court, and subject the plaintiff to the punishment of a recusant witness; while in *Turnpike v. Baily*, *Lane v. Railroad Co.*, *Wanek v. Winona*, *Brown v. Railroad Co.*, and in the dissenting opinion in the *Botsford Case*, it is said that it is not a question of contempt; that the court cannot compel the plaintiff to comply with the order which it has made, but, if he refuses, the court may dismiss his action or refuse to permit him to testify.

From the assertion of the power arising from the apparent necessities of extraordinary cases, as disclosed by the decision in the *Schroeder Case*, we observe the almost limitless extent to which the power has been carried; and, not content with ap-

plying the rule to civil actions for personal injuries, it has been extended to apply to the prosecuting witness in a criminal case (*King v. State*, 100 Ala. 85, 14 South. 878), and, for the same reasons advanced for the exercise of the power in civil actions by the courts asserting its existence, the doctrine has been applied to a criminal case, and the defendant compelled to bare to the view of the jury part of the unexposed portions of his body upon which were certain tattoo marks, in order to enable the state to complete the case against him, with the result that the defendant was convicted of a capital offense. (*State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.)

With this review of the decisions, we pass to a direct consideration of the question as it relates to the trial courts of this state. Our district courts are courts of general jurisdiction created by the Constitution (Article VIII, section 1), their jurisdiction specifically defined by that instrument (Article VIII, section 11), and their powers and authority derived from the Constitution and laws of the state. The laws embrace the statutes and the common law, so far as it has not been supplanted by the statute or is not inconsistent with our conditions. In considering, then, the question of the possible source of such a power as the one asked to be asserted, we search the Constitution and laws for a grant of the power, rather than for limitations upon the power, as appears to be intimated as the doctrine in *Brown v. Railroad Co.*, above; and unless the authority is granted by the Constitution or statutes, by express terms or by necessary implication, or unless the authority existed at common law, we say without hesitation that it cannot be exercised; for there is no such thing in this state as the inherent power of a court, if by that is meant a power not authorized by law.

The only instances in which such power was invoked at common law were in actions for divorce upon the ground of impotency, appeals of mayhem, cases of atrocious battery, cases of conviction of a woman of a capital crime who is alleged to be pregnant, and controversies between heirs and a widow claiming to be pregnant by the deceased. No one of these

rules has ever obtained in this country, unless it has been in cases of divorce on the ground of impotency. The power was exercised by the English ecclesiastical courts, and was a graft from the civil law. In Montana the authority to grant divorces is lodged in our district courts, sitting as courts of equity, and to admit that these courts may exercise the same powers as their English prototypes or the ecclesiastical courts, a part of whose powers they have fallen heir to, argues nothing here. Neither does the fact that here the same court administers law and equity, for, while our courts of equity follow the practice of the English chancery courts in so far as the statutes have not ordained otherwise and the English practice is adapted to our conditions, our law courts are confined strictly to the authority given by the Constitution and statutes and the rules applicable to law courts at common law. A power exercised by a court of equity is not a precedent for the exercise of the same power by a court of law.

It is true that in a few instances the English law courts attempted to compel discovery, but these have been denominated mere usurpations of authority, and in later instances those same courts denied the authority in similar cases, and refused to countenance its exercise (*Newham v. Tate*, 1 Arnold, 224; *Turquand v. Strand Union*, 8 Dowl. 201), and, for the purpose of enabling them to do that which they had attempted to do without authority as above indicated, the statutes of 14 & 15 Victoria, chapter 99, and 17 & 18 Victoria, chapter 125, were enacted.

It would seem that the paucity of common-law precedents affords the very best evidence that the power was not exercised by English law courts, for the English people have never tamely submitted to any curtailments of their personal privileges or their personal liberty. The very fact that at common law the plaintiff in an action of this character could not testify—was not a competent witness—lends further support to the contention that the power was not asserted.

No one would seriously contend that, in the absence of statutes, our law courts could compel the inspection of books and papers, or an examination of property, out of court; indeed, in order to clothe them with some, at least, of the powers possessed by courts of equity, sections 1314, 1317 and 1810 of the Code of Civil Procedure were enacted, as was likewise section 2097 of the Penal Code for obvious reasons, and what we have accomplished by the enactment of these statutes other states have accomplished, not by the arbitrary pronouncements of courts, but by direct legislation. Added force is given to our views by the fact that the legislature which enacted these sections above into our law refrained from granting the power invoked in this case.

The reasons advanced by the courts for the exercise of this power, in the absence of any direct authority, do not commend themselves to us. It is said by some that the power is analogous to the proceeding for discovery; but discovery was not compelled by the law courts at common law, and the best evidence of this is found in the fact that equity interposed in this behalf to prevent failure of justice. If the law courts had possessed and had exercised the power, there would have been no excuse for equity calling into existence the bill of discovery.

By other courts it is said that the assertion of this power is necessary to prevent the plaintiff from malingering and bolstering up a fictitious case "by the very unreliable speculations of so-called medical experts." (*Wanek v. Winona, supra.*) It is a curious process of reasoning which enables a court to characterize the solemn testimony of medical men as unreliable speculations when the witnesses are called by the plaintiff, but if these same physicians be called by the court, upon application of defendant, they immediately become the instrumentalities through which, not approximate, but exact, justice is to be done. Others, including the dissenting opinion in the *Botsford Case*, say it is strange that the plaintiff may, if he chooses, exhibit his injury to the jury, or may testify concerning it, or may have other witnesses do so, but he cannot be compelled to make such exhibition.

We are of the opinion that even if the plaintiff might, as a matter of right, exhibit his injuries to the jury, it would not add to the argument in behalf of that view of the case. In this state, however, he does not possess that right. He may offer to do so, but it is within the discretion of the court to permit or refuse the offer, subject, of course, to review for a manifest abuse of that discretion. (Code of Civil Proc., sec. 3250.)

The right to the inviolability of one's person is merely a privilege which plaintiff may waive, as a defendant may the constitutional guaranty that in a criminal case he cannot be compelled to be a witness against himself. The defendant cannot be compelled to be a witness against himself in such a case, but he may become such if he chooses; and, if he takes the witness-stand in his own behalf, he so far waives the constitutional guaranty that he may be compelled to answer all proper questions on cross-examination, even though the answers may tend to incriminate him. And as a defendant may give evidence against himself, but cannot be compelled to do so unless he waives the privilege, so the plaintiff may exhibit portions of the clothed parts of his body to the jury, if the court permits, but cannot be compelled to do so. The constitutional guaranty is not more solemn and binding in one instance than in the other. And, for the much stronger reason, plaintiff cannot be compelled to make such exhibition of himself to third parties, strangers to the case, in order that they may procure material for testimony.

Furthermore, our Code (Part IV, Code of Civil Proc.) assumes to promulgate the general principles and rules of evidence which are in force in this state, and sets forth specifically the means of its production; and the same Code declares that "the Code establishes the law of this state respecting the subjects to which it relates." (Section 3453.) This portion of the Code assumes to define judicial evidence (section 3100), distinguishes the kinds (section 3104), and provides for the means by which legal evidence may be produced. (Sections

3300-3312.) These provisions are ample to secure the attendance of a witness upon a court, and the production for use in evidence of any books, documents, or other things which the witness may by law be bound to produce; and sections 1314, 1317 and 1810, above, make provision for the examination of books, papers and other property out of court. But, with these direct exceptions, there is no authority for compelling one litigant to furnish the means by which the other may procure evidence. The plaintiff may be compelled to go upon the witness-stand and answer all proper questions put to him, or to produce books and papers in his control, or permit the examination of property in his possession, and, so far as the defendant may reap any benefit therefrom, it may be said that the plaintiff is compelled to furnish evidence for his adversary; but further than this there is no warrant in the law for our courts proceeding.

From the authority directly conferred upon the district courts of this state, there cannot be implied this extraordinary power. There is no grant of power from which it could be implied. However, the assertion of the power by certain courts is no more extraordinary than the remedy proposed for violation of the order. To say that a court can make an order but cannot enforce it, is remarkable, to say the least. To say that a court may refuse to permit a witness to testify, or dismiss his action if he refuse to comply with the order, is a doctrine which we cannot approve. Except in particular instances where the authority is directly conferred (and the present case does not present one of them), our courts have no authority to refuse to permit the plaintiff to testify or to dismiss his action. For a trial court of this state to make an order of this character and prescribe dismissal of the action as a penalty for noncompliance, would amount to a clear usurpation of authority in each instance. The order would be made without authority, and, in case of disobedience, the penalty inflicted without sanction of the law.

The arguments advanced in favor of the assertion of this power might with propriety be addressed to a legislative assembly, but not to the courts, and we decline to resolve this court into a law-making body, even though it may be considered by text-writers more *enlightened* to do so. We prefer to follow the doctrine announced by the supreme court of Massachusetts—that it is a matter for legislative control, and, in the absence of legislation, the courts ought not to usurp the authority.

2. Privileged communications: The appellant insists that Dr. McGrath should have been permitted to testify as to the condition of the plaintiff at the time he attended her as her physician. Section 3163 of the Code of Civil Procedure, among other things, provides: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * (4) A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Most of the states in the Union, if not all, have similar statutory provisions.

It is to be observed that the plaintiff upon her direct examination merely described her injury, and told of her treatment by Drs. Brethour and Buchen. Upon cross-examination she admitted that Dr. McGrath had also attended her as her physician, and had treated her for the injury complained of; but she did not assume to detail any conversation had with Dr. McGrath, or to tell of the character or extent of the treatment which he gave her. Of course, if the patient calls the physician as a witness to testify, he thereby expressly consents to the proceeding, or, if he sits by and fails to object, he tacitly consents that the physician may testify.

Furthermore, it has been held that where the patient directly attacks the physician, as by an action for damages for malpractice, he abandons the protection given by the statute,

for he thereby challenges the physician to disprove the patient's contention as to the character of his injury or of the physician's treatment. (*Lane v. Boicourt*, 128 Ind. 420, 25 Am. St. Rep. 442, 27 N. E. 1111.) It has also been held that where two or more physicians are employed at the same time, with respect to information gained at the same consultation, calling one of the physicians as a witness by the patient, constitutes a waiver of the statutory prohibition as to the other or others (*Morris v. New York etc. Ry. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410), although this doctrine is disputed by respectable authority (*Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790).

Likewise it has been held that, where the patient calls the physician as a witness at one trial, this constitutes a waiver of the privilege as to that physician upon a second trial of the same case. (*McKinney v. Grand Street R. R. Co.*, 104 N. Y. 352, 10 N. E. 544.) But this doctrine has also been disputed in *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 89 Am. St. Rep. 359, 86 N. W. 307, 54 L. R. A. 364, and *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372. But so far as our investigation discloses, no court of last resort has ever held that the mere fact that the patient testifies generally concerning his condition constitutes a waiver of the privilege granted by the statute.

In *Marx v. Manhattan Ry. Co.*, 56 Hun, 575, 10 N. Y. Supp. 159, the supreme court of New York held that, where the patient assumes to tell all that took place between himself and the physician, this constitutes a waiver of the privilege; and in *Treanor v. Manhattan Ry. Co.*, 21 Civ. Proc. 364, 16 N. Y. Supp. 536, decided by the common pleas court of New York City, it was also held that, where the patient testifies without reservation as to his injuries and their effect upon him, this likewise constitutes a waiver of the privilege. But these cases were later disapproved, and in effect directly overruled, by the supreme court of New York in *Fox v. Turnpike Co.*, 59 App. Div. 363, 69 N. Y. Supp. 551, and *Dunkle v. Mc-*

Allister, 70 App. Div. 273, 74 N. Y. Supp. 902, and by the court of appeals of New York in *Morris v. New York etc. Ry. Co.*, above.

In *Highfill v. Missouri Pac. Co.*, 93 Mo. App. 219, it is said that, where a patient goes on the stand and testifies as to what his physician found and said, he thereby waives the privilege under the statute. It may be safely said that the Missouri appellate court is now the only court asserting the doctrine announced by it, and even that case can hardly be a precedent in favor of the contention of appellant here, for this plaintiff did not assume to tell what Dr. McGrath had done for her, or to detail any conversations with him, and her statement that he had been her physician was not a voluntary one, but was brought out on cross-examination.

It is not the inherent incompetency of the evidence that precludes it being given, but it is the fact that the evidence comes from a person who occupies a certain relation of confidence to the patient, by virtue of which the statute says he shall not disclose his information without the consent of the person from whom he gained it. So far as we are aware, the authorities are uniform in holding against this contention of appellant. (*Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872; *Citizens' Street Ry. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765; *Warsaw v. Fisher*, 24 Ind. App. 46, 55 N. E. 42; *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790; *Burgess v. Sims Drug Co.*, 114 Iowa, 275, 89 Am. St. Rep. 359, 86 N. W. 307, 54 L. R. A. 364; *Butler v. Manhattan Ry. Co.*, 30 Abb. N. C. 78, 23 N. Y. Supp. 163, affirmed in 143 N. Y. 630, 37 N. E. 826; *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36.)

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

**BULLERDICK, RESPONDENT, v. HERMSMEYER ET AL.,
DEFENDANTS; HERMSMEYER, APPELLANT.**

32	541
30	379

(No. 2,110.)

(Submitted May 6, 1905. Decided July 3, 1905.)

Water Rights—Appurtenances—Conveyance—Parol Contract—Specific Performance—Probate Courts—Jurisdiction—Presumptions—Homestead—Apportionment—Public Use of Water—Adverse Use.

Probate Courts—Homestead—Apportionment—Petition.

1. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, it was immaterial whether it acted on petition or on its own motion.

Homestead—Apportionment—Conveyance—Appurtenances—Water Rights.

2. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, she had a right to convey the same, and her grantee became vested with the fee and such conveyance vested him with whatever right she had to the use of water appurtenant thereto, together with the means of using same.

Deeds—Water Rights—Appurtenances—Extrinsic Evidence.

3. Where a deed to certain land does not specify the particular appurtenant water right alleged to have been conveyed by it, extrinsic evidence may be resorted to to establish such right.

Probate Courts—Conveyances—Executors—Parol Contracts—Specific Performance—Statutes.

4. *Query:* Under the provisions of the Organic Act, could the legislature by Compiled Statutes, Second Division, section 236, clothe probate courts with jurisdiction to direct specific performance of a parol contract, by which decedent in his lifetime agreed to convey certain water rights to his wife?

Probate Courts—Jurisdiction.

5. Probate courts, or district courts sitting in probate, have but a special and limited jurisdiction, and their powers are such as are expressly granted by the statute, or necessarily implied to give effect to those expressly granted.

Probate Courts—Administrators—Specific Performance—Presumptions.

6. Where a petition, filed by an administrator, under Compiled Statutes, Second Division, section 236, to enforce a contract by deceased to convey certain water rights, did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court, therefore, had jurisdiction to enforce the same.

Probate Courts—Specific Performance—Void Decree—Curative Acts.

7. Where a decree of a probate court for specific performance of a contract by decedent in his lifetime to convey certain water rights to

his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by Session Laws 1899, p. 145, subsequently passed, to validate judicial sales by executors and administrators, etc.

Water Rights—Tenants in Common—Interest of Each—How Measured.

8. Where parties acquired certain land in separate parcels from the owners of a water right appurtenant to the land, they each became vested with an interest in the water measured in amount by the requirements of each, whether they were tenants in common or not.

Water Rights—What may Constitute an Original Appropriation.

9. Where the owner of certain land had used water from a main irrigation ditch through a lateral from the date it was decreed to her by the probate court, such use constituted an original appropriation, though such decree was void for want of jurisdiction.

Water Rights—Evidence—Adverse Use.

10. In a suit to determine water rights of the owners of certain land, evidence held insufficient to support a finding that plaintiff had acquired a right to the use of all of the waters of the stream by adverse use since 1888.

Real Estate—Prescription—Adverse Use.

11. A right by prescription against the owner of real estate may be acquired only by an open, notorious, exclusive and adverse holding, under a claim of right during the full statutory period—the use must be such as to constitute an invasion of a right which the owner may at any time assert, but fails to exercise until the full statutory period has passed.

Waters—Public Use—Manner of Use.

12. The use of the waters in streams being declared by the Constitution, Article III, section 15, to be a public use, every citizen is entitled to divert and use them so long as he does not infringe the rights of some other citizen who has acquired a prior right by appropriation, on condition that he restore the waters to the channel of the stream on the cessation of his necessity.

Waters—Adverse Use—Prescription.

13. If a use of water becomes and continues adverse and exclusive for the full period described by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.

Appeal from District Court, Madison County; M. H. Parker, Judge.

ACTION by Lewis Bullerdick against Frederick Hermsmeyer and others. From the judgment and an order denying him a new trial, defendant Frederick Hermsmeyer appeals. Modified and affirmed.

Mr. W. A. Clark, for Appellant.

It was incumbent upon the plaintiff to establish all the jurisdictional facts leading up to and authorizing the administratrix to make this deed, and without their establishment, it was

error to admit the same in evidence, or to consider the same in making up the findings in this case. (*Dawson v. Parham*, 47 Ark. 215, 1 S. W. 72; *White v. Moses*, 21 Cal. 34; *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266, 34 Atl. 706; *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48; *Tucker v. Murphy*, 66 Tex. 355, 1 S. W. 76; *Chase v. Ross*, 36 Wis. 267.)

The right to water acquired by a prior appropriation is not in any way dependent upon the *locus* of its application to any beneficial use designed, or to the particular use to which it was originally applied, but it may be used for any useful or beneficial purpose. (*Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 442; *Maeris v. Bicknell*, 7 Cal. 261, 68 Am. Dec. 257; *McDonald v. Bear River etc. Mfg. Co.*, 13 Cal. 220; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *Coffin v. Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud*, 6 Colo. 530; *Woolman v. Garringer*, 1 Mont. 535; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32.)

Hermesmyer was not confined to the use of his water for irrigating purposes or required to put it on dry land for the purpose of irrigating crops. He had the right to apply it to any beneficial use which was valuable or necessary to the land, or would benefit it. (*Union Mill & Min. Co. v. Dangberg*, 2 Saw. 450, 81 Fed. 73; *Senior et al. v. Anderson et al.* (Cal.), 62 Pac. 563; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 279; *Pomeroy on Riparian Rights*, 47; *Kinney on Irrigation*, secs. 150, 151, 154.) The defendant has a perfect right, if he so desires, to change the place of use of this water which belonged to this tract of land. (*Coffin v. Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud et al.*, 6 Colo. 530; *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Meagher v. Hardenbrook*, 11 Mont. 381, 28 Pac. 451; *Creek v. Bozeman Waterworks Co.*, 15 Mont. 121, 28 Pac. 459; *Woolman v. Garringer*, 1 Mont. 535; *McDonald et al. v. Bear River etc. Co.*, 13 Cal. 220; *McDonald v. Lannen et al.*, 19 Mont. 78, 47 Pac. 648; *Atchinson v. Peterson*, 20 Wall. 507, 22 L. Ed. 442.)

The failure of one tenant in common to use water or to use all the water which he is entitled to is not any abandonment of the surplus or of his interests. (*Moss v. Rose*, 27 Or. 595, 50 Am. St. Rep. 743, 41 Pac. 666; *Meagher v. Hardenbrook*, 11 Mont. 385, 28 Pac. 451; *McGillivray v. Evans et al.*, 27 Cal. 92.)

To establish a right by prescription or adverse use, the acts by which said right is sought to be established must operate as an invasion of the rights of the party against whom it is set up. It must be open, peaceable, adverse and under claim of title. (*Talbott et al. v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Union M. & M. Co. v. Dangberg*, 2 Saw. 450, 81 Fed. 73; *The Mining Debris Case*, 9 Saw. 441, 18 Fed. 753; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Cave v. Crafts*, 53 Cal. 135; *Ledu v. Jim Yet Wa*, 67 Cal. 346, 7 Pac. 731; *Winter v. Winter*, 8 Nev. 129; *Egan v. Estrada* (Ariz.), 56 Pac. 721; *Dick v. Bird*, 14 Nev. 161; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623; *Dick v. Campbell*, 14 Nev. 167.) The waters in question had become appurtenant to the lands for which they were originally appropriated. Mrs. Foster, as administratrix of the estate or otherwise, could not by a wrongful or fraudulent procedure divest these lands of such appurtenances, and the probate court had no authority to interfere with them, or to segregate the land from the water. (*Cave v. Crafts*, 53 Cal. 135; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Standard v. Round Valley Co.*, 77 Cal. 399, 19 Pac. 689; *Crocker v. Benton*, 93 Cal. 365, 28 Pac. 953; *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; *Bank v. Miller et al.*, 6 Fed. 545; *Wilson v. Higbee*, 62 Fed. 723.)

Mr. S. V. Stewart, and *Mr. Edmund J. Callaway*, for Respondent.

The public is so far concerned with the use of water that it is declared in our Constitution that the use of all water now

appropriated, or that may be hereafter appropriated, shall be held to be a public use. (Const., Art. III., sec. 15; *Smith v. Deniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32; *Creek v. Bozeman W. W. Co.*, 15 Mont. 121, 38 Pac. 459; Mont. Civ. Code, secs. 1880, 1881; Kinney on Irrigation, secs. 165, 166; *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 67 Am. St. Rep. 634, 41 L. R. A. 311, 52 Pac. 765.) If there is no intention on the part of the appropriator to apply the water to some useful purpose within a reasonable time, there is no valid appropriation, and the water remains subject to appropriation by others. (*Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 279; *Manning v. Fife* (Utah), 54 Pac. 111; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *X. Y. Irr. Co. v. Buffalo Creek Irr. Co.*, 25 Colo. 529, 55 Pac. 720; Kinney on Irrigation, secs. 151, 152.)

One who has the ownership of water may change the place of use when he desires, if the rights of others be not injuriously affected. So one owning several tracts of land may take it from one tract and use it upon an entirely different tract. (*Woolman v. Garringer*, 1 Mont. 535; *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 442; *Meagher v. Hardenbrook*, 11 Mont. 385, 28 Pac. 451; *Creek v. Bozeman W. W. Co.*, 15 Mont. 121, 38 Pac. 459.) One who stands passively by and allows another to open out fields and irrigate them with water for a long period of years under the belief that he has a vested right to the same is estopped from asserting such rights against the adverse user. (*Dalton v. Rentaria*, 2 Ariz. 275, 15 Pac.

37.) A right to the use of water may be acquired by the exclusive and uninterrupted use of water in a particular way for a period corresponding to the time fixed by the statute of limitations as a bar to an entry on lands. (*Crandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Creary*, 25 Cal. 504, 85 Am. Dec. 145; *American Water Co. v. Bradford*, 27 Cal. 360; *Los Ange-*

les v. Baldwin, 53 Cal. 469; Kinney on Irrigation, sec. 256, and long list of cases cited.)

The American court of probate is entitled to the same respect and presumption of conclusiveness as to the regularity of its proceedings as any court of record. "The record is absolute verity, to contradict which there can be no averment or evidence." (*Grignon's Lessee v. Astor*, 2 How. (U. S.) 340, 11 L. Ed. 283; Brown on Jurisdiction, secs. 127, 129, 146; *J. B. Watkins L. M. Co. v. Mullen*, 62 Kan. 1, 61 Pac. 385; *Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Wolfley v. McPherson*, 61 Kan. 492, 59 Pac. 1054.) The general rule is that there is no presumption that the contract was parol. It is well settled that the pleadings need not allege that a contract which would be void unless reduced to writing and signed was in fact in writing. (*Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Vassault v. Edwards*, 43 Cal. 458.)

And it is to be presumed that it is a written agreement, there being nothing to show the contrary. (*Hefferlin v. Karlman*, 29 Mont. 150, 74 Pac. 201, and cases cited as above.)

APPELLANT'S REPLY BRIEF.

Where the title comes from a common source, as in the case at bar, the party seeking to establish his right must show every step necessary to indicate to the court that that right is superior to that of the one contested. (*Ritchie et al. v. Sauers et al.*, 100 Fed. 520; *Moore et al. v. Town Council*, 32 Fed. 498; *United States v. Walker*, 109 U. S. 258, 27 L. Ed. 927, 3 Sup. Ct. 277.) Even where the curative statute is invoked, if the proceedings show that the court had no jurisdiction, they are not affected by the curative statute. (*Rogers v. Clemmans*, 26 Kan. 522; *Morton v. Reynolds*, 4 Rob. (La.) 26.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this action is to obtain a decree quieting the title to the use of the waters of Mill creek in Madison county. The plaintiff asserts the right to the prior use of these waters to the amount of five hundred inches to irrigate the west half of the southwest quarter of section 33, township 4 south of range 5 west, and lots 1, 2 and 3, and the south half of the northeast quarter of section 4, township 5 south of range 5 west, the said lands being arid, and requiring the use of water to render them productive. He alleges two causes of action, the first being based upon the adverse use of the waters from 1888 down to the date of filing the complaint, and the second upon mesne conveyances from Sargent Hall and Joseph Cowan, who first diverted and appropriated the waters for the purpose of irrigating the lands described and others. The defendant Hermsmeyer also claims under mesne conveyances from Hall and Cowan, and alleges the right to the prior use of the waters to the amount of three hundred inches to irrigate the west half of the southeast quarter, and the east half of the southwest quarter of section 33, township 4 south of range 5 west. The claim of Cock is based upon a conveyance by Minnie O. Foster, as administratrix of the estate of Thomas J. Foster, of the east half of the southeast quarter of section 32, township 4 south of range 5 west. McCrea disclaims any interest in the subject of the controversy, he being a tenant of Hermsmeyer.

The district court found that the parties are tenants in common in the Hall and Cowan ditch and the waters diverted thereby, that the plaintiff is entitled to the use of two hundred inches, and that the defendant Cock and Hermsmeyer are each entitled to the use of fifty inches, these amounts being declared to be all that is required for use by the respective parties. A decree was entered settling the rights accordingly, and directing further that, in case the waters flowing in the stream should at any time fall below the measurement of three hundred inches, the parties should be entitled to use them in quantities in proportion of their respective rights so declared. From the judgment and an order denying him a new trial, defendant Hermsmeyer has appealed.

There is no controversy but that the rights of the parties as to priority must be determined by the connection shown by them with the Hall and Cowan appropriation. This was made in 1865, and for the purpose of irrigating lands now owned by the plaintiff and defendant Hermsmeyer. One Thomas J. Foster succeeded to Hall and Cowan in 1866. From that time he cultivated all of the lands owned by the defendant Hermsmeyer in section 33, as well as those owned by the plaintiff. He also cultivated a portion of those owned by plaintiff in section 4. All of them were at that time unpatented public lands. Title to those in sections 33 and 32 were afterward obtained by Foster through patents from the United States. Patent to those in section 4 was obtained by one Minnie O. Smith, who afterward became the wife of Foster. Upon his death she administered upon his estate, and, under the direction of the probate court sold all the lands belonging to Foster in sections 33 and 32, except the west half of the southwest quarter of section 33. Defendant Hermsmeyer became the owner of those in section 33 by mesne conveyance, together with the water rights and ditches belonging to it. Thus his title is connected directly with the Hall and Cowan right. In fact, there is no controversy but that this is the case, the dispute being as to whether he is the successor to the whole of the Hall and Cowan right.

On June 13, 1888, upon application of Minnie O. Foster, the probate court set aside to her as a homestead the west half of the southwest quarter of section 33, together with the water rights, ditches and appurtenances thereunto appertaining. The same court, also on September 3, 1888, made and entered a decree declaring her entitled to a conveyance of three hundred inches of the waters of Mill creek to irrigate the lands belonging to her in section 4. This decree was based upon an application to the court by her, in which she set up an agreement between herself and Thomas J. Foster prior to their marriage, under the terms of which, and upon the payment of \$100, Foster agreed to convey to her, that amount of water,

together with an interest in the ditch. In the same decree it was ordered and adjudged by the court that two hundred inches more of the waters be set apart to her specially for the irrigation of the land in section 33 set apart to her as her homestead. The decree also directed that, inasmuch as it appeared to the court that the administratrix had sold all of her interest in the waters to Lewis Bullerdick, the plaintiff herein, the conveyance thereof should be made to him. This was afterward done. Minnie O. Foster also conveyed to the plaintiff her homestead in section 33 and all the lands owned by her in section 4. Upon these proceedings, as well as upon his continued use of the water from the date at which they took place until the complaint was filed in this case, the plaintiff asserts the right to a prior use of five hundred inches. In the court below, objection was made to the introduction of the proceedings in the probate court as evidence of plaintiff's title to an interest in the water, and this objection presents the principal question for determination upon this appeal.

The contention is made that the action of the probate court in setting aside the homestead was without jurisdiction, and therefore that the deed to the homestead from Minnie O. Foster to plaintiff conveyed to him no right to the use of water. This contention cannot be sustained. The statute in force at that time (Compiled Statutes, 1887, Second Division, section 134) made it the duty of the probate court or judge, upon the coming in of the inventory, to set aside to the surviving husband or wife, or minor children of the decedent, all exempt property, including the homestead selected and recorded during the lifetime of the decedent. If none had been so selected and recorded, then it was the duty of the judge to select and set apart one from the state of the decedent, and have it recorded. In either case the proceeding was upon petition, or upon the court's or judge's own motion. Thereupon the homestead so selected became the property of the surviving husband or wife and children, or, if there were none, then exclusively of the surviving husband or wife. (Id., sec. 137.)

Foster had no children; therefore the fee of the homestead vested in his widow. It does not appear distinctly whether the court or judge acted upon petition or not. We do not think this material. It was sufficient that the land in question was set apart to her by the court or judge as her homestead. She thereupon had a right to convey it, and her grantee became vested with the fee. The conveyance by Minnie O. Foster to the plaintiff, therefore, necessarily vested him with whatever right she had to the use of water which was appurtenant to the homestead, together with the means of use. (*Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571.) To what extent the use of water was appurtenant is not stated in the deed, and must be determined by reference to the evidence; for when the deed does not specify the particular appurtenant right alleged to have been conveyed by it, extrinsic evidence must be resorted to in order to establish it. (*Hays v. Buzzard et al.*, 31 Mont 74, 77 Pac. 423.) What the evidence tends to establish with reference to the use of the waters and ditch in connection with the homestead, we shall see later.

Contention is also made that the decree of the probate court of September 3, 1888, setting apart the two hundred inches of the waters for use upon the homestead, and directing the conveyance of three hundred inches under the contract made by Minnie O. Foster with Thomas J. Foster in his lifetime, is void upon its face, and that Bullerdick, the plaintiff, acquired no right under the conveyance made in pursuance of it. The validity of the decree is challenged upon several grounds. It will be necessary to notice but one of them. It does not appear from the petition that the agreement was in writing. This fact, it is said, is jurisdictional. The proceeding was instituted under section 236, Second Division, Compiled Statutes of 1887, which provides: "When a person who is bound by contract, in writing, to convey any real estate, dies before making the conveyance, and in all cases where such decedent, if living, might be compelled to make such conveyance, the pro-

bate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto." It may well be doubted whether, under the provisions of the Organic Act, the legislature could clothe probate courts with equitable power such as that granted by this section. (*Ferris v. Higley*, 20 Wall. 375, 22 L. Ed. 383.) But this question is not before us, and need not be decided.

The supreme court of California considered an identical provision in *Cory v. Hyde*, 49 Cal. 469, and held that notwithstanding the words, "and in all cases where such decedent, if living, might be compelled to make such conveyance," the power of the probate court to enforce conveyances under it must be limited to such contracts as are in writing. After noting the fact that the words quoted had been inserted by way of amendment to the section as it appeared in the former Code of the state, the court observes: "But if the words of the amendment enlarge the jurisdiction, they cannot be limited to conferring a power to decree specific performance in cases of oral contracts for the sale or purchase of lands, where there has been such part performance as destroyed the *status quo*, but must be held to transfer to that court a vast equitable jurisdiction in respect to trust estates and matters of fraud, much of which cannot be said to be auxiliary to the settlement of estates. We cannot suppose that it was the purpose of the legislature to confer these powers on the probate court by the use of language which does not distinctly avow such purpose, and which may fairly be construed to indicate a different intention." The court here recognized the rule, well settled in this state, that probate courts, or district courts sitting in probate, have but a special, limited jurisdiction, and that their powers are such as expressly granted by the statute, or necessarily implied to give effect to those expressly granted. (*State ex rel. Kelly v. District Court*, 25 Mont. 33, 63 Pac. 717; *State ex rel. Shields v. District Court*, 24 Mont. 1, 60 Pac. 489; *Davidson v. Wampler et al.*, 29 Mont. 61, 74 Pac. 82.)

If the rule declared in the case of *Cory v. Hyde*, *supra*, be

correct—and we think it is, for we do not think the statute expressly declares, or even implies necessarily, that the power granted extends to oral contracts—the petition, in order to put in motion the power granted, must have shown that the contract was in writing. The petition filed by the administratrix does not show on its face that the contract was in writing, but rather implies the contrary. The court, therefore, was without power to proceed, and the order was not effective for any purpose. The district court, therefore, erred in admitting this evidence for the purpose of giving validity to the deed to the three hundred inches of water from Minnie O. Foster to Bullerdick. Nor did the decree, so far as it purported to set apart the two hundred inches for use upon the homestead, have any validity. The proceeding was under the statute to enforce the specific performance of the contract, and the petition did not ask for or contemplate any other relief. The provision seems to have crept into the decree by inadvertence.

Counsel for respondent, however, say that it was not necessary under any circumstances to allege that the particular contract was in writing, since the presumption obtains that a contract has been executed with the formalities required by law, unless the contrary appears. This is the rule in this state in ordinary suits founded upon contract. Yet, where the court is of limited jurisdiction, and its power to proceed depends upon express provisions of a statute, it is necessary for the application to present a case falling within them, else the power of the court is not put in motion, and any adjudication made in the proceeding founded upon an application not setting forth the jurisdictional facts must necessarily be void. The decree being void for want of jurisdiction in the court at the time of its rendition, the Act of 1899 (Session Laws 1899, p. 145) could not render it valid. (*Davidson v. Wampler et al.*, *supra*.) The decree, therefore, vested no title in the plaintiff, who became the grantee of the administratrix. But though this be true, yet we are of the opinion that the judgment of the district court should not be set aside entirely. We think that

this court may adjust the rights of the parties upon the facts presented in the record.

All the parties claim title from a common source, namely, the Hall and Cowan appropriation of 1865. Foster, after acquiring this right, used the water upon all the lands described in the pleadings according to their needs. The ditch first constructed by Hall and Cowan was used to convey all the waters of the creek—never in excess of three hundred inches during the summer season—to the lands owned by Foster as well as to those owned by Minnie O. Foster in section 4. This use by him upon the lands of Mrs. Foster did not necessarily make the waters, or any part of them, appurtenant thereto. He had the title to the use of the water, and it was appurtenant to the lands owned by him; she had title to the lands, and there is nothing in the record to indicate an intention on the part of Foster to make these waters, or any portion of them, appurtenant to his wife's lands. Being appurtenant to the lands owned by him, and the parties having acquired them in separate parcels, they each became vested with an interest in the water, measured in amount by the requirements in each case, whether they may technically be designated as tenants in common or not. So the parties continued to use the waters until this controversy arose out of an attempt on the part of Hermsmeyer to lease them to his tenants, to be used on lands owned by them. Up to about the time this controversy arose his use was confined to an amount not to exceed fifty inches, because his lands did not, and do not, require water except upon a small area not exceeding twenty-five acres. So Cock was awarded fifty inches, because only that amount was necessary to meet his requirements, as shown by his use of it since he purchased his portion of the Foster land.

In so far as the homestead in section 33 is concerned, the plaintiff's title to use his share of the water is of the same age and dignity with that of the other parties. The evidence tends to show that this land needs, and always has needed, more water than any of the other lands, and that a greater

amount has been used on them. It appears that the homestead has been cultivated to the extent of seventy acres, and that one inch per acre is required. As to the use by plaintiff upon the Minnie O. Foster lands, since plaintiff has failed to connect his title with that of Foster, but yet has shown a use from the main ditch through a lateral since September 3, 1888, the date of the decree of the probate court, this should be held to be an original appropriation as of that date.

It thus appears that the amount awarded to him by the district court was correct, but that the court was in error in finding a greater amount than seventy inches derived from the Hall and Cowan appropriation. The court should have found and declared him entitled only to this amount as the successor of the Hall and Cowan right, and of the remainder as of the later date.

We do not think that the evidence would warrant a finding that the plaintiff has acquired a right to the use of all the waters of the stream by adverse use since 1888. It is true that the evidence shows that during many of the intervening years he used them exclusively. But it also shows that, during the years when the defendants cultivated their lands and needed the waters, they used them to the extent deemed necessary. At best, during many of the years from 1888 to the bringing of this action, the possession was a scrambling one, and the use by any of the parties was not so continuously and exclusively adverse for the statutory period as to create a right thereunder. We understand the rule to be that, in order to acquire a right by prescription against the owner of real estate, the holding must be open, notorious, exclusive and adverse under a claim of right during the full statutory period. In other words, the use must be such as to constitute an invasion of a right which the owner may at any time assert but fails to do so until the full statutory period has passed.

The use of the waters in the streams in this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15.) Such being the case, every citizen has a right

to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a prior right by appropriation. Each citizen may divert and use them without let or hindrance when no prior right prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them. In no case does such use become adverse until some superior right is infringed and the owner of it suffers deprivation. If it becomes and continues adverse and exclusive for the full period prescribed by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.

The order denying a new trial is affirmed. The cause is remanded to the district court with directions that the decree be modified as follows: That the plaintiff and defendant Hermsmeyer be adjudged entitled to the use of seventy and fifty inches, respectively, as of the date of July, 1865, without right of priority as against each other or defendant Cock; that the plaintiff be adjudged to be entitled to the use of the remaining waters of Mill creek, to the extent of one hundred and thirty inches, as of the date of the sale by Minnie O. Foster, as administratrix, on December 24, 1888; and that, if the quantity flowing in the stream shall decrease at any time to less than one hundred and seventy inches, the plaintiff shall be entitled to use seven-seventeenths, and the defendants Hermsmeyer and Cock each to five-seventeenths, thereof. When so modified, the decree will be affirmed. The appellant will pay one-half the costs of the appeal.

Modified and affirmed.

MR. JUSTICE HOLLOWAY CONCURS.

MR. JUSTICE MILBURN: I concur, except as to that part of the opinion which assumes that a water right may be acquired by "adverse user" (dissenting in *Talbott v. Butte City M. Co.*, 29 Mont. 27, 73 Pac. 1111).

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**BRAZELL, RESPONDENT, v. COHN ET AL., DEFENDANTS;
COHN, APPELLANT.**

(No. 2,109.)

(Submitted May 6, 1905. Decided July 3, 1905.)

*Sales — Contracts — Breach — Complaint — Costs — Security
— Application — Instructions — Damages — Reduction —
Harmless Error.*

Costs—Security—Application—Notice.

1. *Held* that, where defendant did not apply for an order requiring plaintiff, a nonresident of the State, to give security for costs until the day on which the cause was set for trial, and where no previous notice of such demand had been given, the district court was justified in denying a stay until the cost bond was given, on the ground that the application was made too late.

Breach of Contract—Complaint.

2. Where, in an action for breach of contract to purchase certain milk, the complaint alleged that plaintiff was then and there able, ready and willing, and offered to perform all the terms and conditions of the contract to be performed by him during the term of the contract and was and would be during the entire continuance of the contract able, ready and willing to perform the same and had offered so to do, etc., it was not objectionable for failure to allege in terms that plaintiff had "fully complied with all the terms and conditions of the contract by him to be kept and performed."

Contracts—Instructions.

3. In an action for breach of contract, a requested instruction that the jury, in fixing damages for nonperformance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance of the contract, was vague and indefinite, and not authorized by Civil Code, section 4301, providing that no damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin.

Contracts—Breach—Evidence—Prejudice.

4. Where, in an action for breach of contract to purchase certain milk the court sustained an objection to a question asked of one of defendants' employees whether there was any effort on defendant's part, or anyone acting under him, to break the contract, the fact that before a ruling on the question was finally made the witness stated that he did not want to answer the question unless he had to, that he was in the confidence of the defendants, and did not want to be placed in the position of telling what happened and what did not happen, the question thus remaining unanswered, was not reversible error.

Sales—Breach of Contract—Damages.

5. In an action for breach of a contract to purchase all of the milk of plaintiff and his assignor for a period of five years from November, 1899, defendants having repudiated the contract, plaintiff was entitled to recover the difference between the market and the contract price of milk he would have produced during the contract period, regardless of the fact that after defendant's breach of contract plaintiff disposed of his milk business, and was therefore unable thereafter to perform the contract on his part.

Sales—Breach of Contract—Same—Reduction of Damages.

6. Where defendants broke a contract to purchase all of plaintiff's milk at wholesale for a specified price per gallon for five years, plaintiff was not thereafter required to change the character of his business, and sell his milk at retail, in order to reduce his damages.

Appeal—Verdict—Harmless Error.

7. Where the evidence would have supported a verdict for a greater amount than that returned in favor of plaintiff, defendants were not entitled to object that the exact amount awarded was not justified by the evidence.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Thomas F. Brazell against Louis S. Cohn and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant Cohn appeals. Affirmed.

Messrs. Kirk & Clinton, for Appellant.

The court erred in overruling the objection that the complaint did not state facts sufficient to constitute a cause of action, in that the assignee of the contract never duly or at all performed the obligations in the said contract on him binding. The plaintiff may allege and prove a contract and that he either performed or offered to perform his part to be performed. No such allegation appearing in the complaint, the complaint does not state a cause of action. (4 Ency. of Pl. & Pr. 639; *Barron v. Frink*, 30 Cal. 486; *Hill v. Grigsby*, 35 Cal. 662.)

The testimony of Fitzpatrick was also prejudicial to defendant. (*Harrison v. Sutter Street Ry.*, 116 Cal. 156, 47 Pac. 1019; 14 Ency. of Pl. & Pr., pp. 760, 761, and notes; *McDonald v. Walters*, 40 N. Y. 551.)

No remote or speculative damages can be allowed. (*White v. Miller*, 71 N. Y. 118-133, 27 Am. Rep. 13; *Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341.) No vindictive damages can be allowed. (*Hoy v. Grenoble*, 34 Pa. St. 9, 75 Am. Dec. 628.) Plaintiff was bound to keep his damages down to the lowest amount possible. (*Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341; *Davis v. Fish*, 1 G. Greene, 46, 48 Am. Dec. 387; *Gazette etc. Co. v. Morss*, 60 Ind. 158; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.) Plaintiff must prove actual damages. These consist of the difference between the market price of his product and the price the defendant agreed to pay. The facts were capable of proof, and the plaintiff was bound to furnish such proof or fail in his action. (*Masterton v. City of Brooklyn*, 7 Hill (N. Y.), 61, 42 Am. Dec. 38; *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168, 4 Sup. Ct. 81; *Howard v. Stillwell et al.*, 139 U. S. 199, 35 L. Ed. 147, 11 Sup. Ct. 500; *Hoy v. Grenoble*, 34 Pa. St. 9, 75 Am. Dec. 628; *Utter v. Chapman*, 38 Cal. 659; *Hill v. McKay*, 94 Cal. 15, 29 Pac. 406; 14 Ency. of Pl. & Pr., p. 761.)

Mr. John J. McHatton, for Respondent.

The complaint states a cause of action. (*Jacobs, Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 64, 42 Pac. 109.) The offer of performance placed the burden on the defendants to plead, as a matter of defense, any failure on the part of the plaintiff to comply therewith previous to that time and which would justify their refusal. This they attempted to do. (See, also, Civ. Code, secs. 4270, 4272, 4300, 4367; *Hale v. Trout*, 35 Cal. 229; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687; *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189, 191; Greenleaf on Evidence, sec. 268a; *Morgan v. Reynolds*, 1 Mont. 163; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Lambert v. Haskell*, 80 Cal. 619, 22 Pac. 327; *Hawthorne v. Siegel*, 88 Cal. 158, 22 Am. St. Rep. 291, 25 Pac. 1114; *Insurance Co. v. Boon*, 95 U. S. 117,

130, 24 L. Ed. 395; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Dwyer v. Carroll*, 86 Cal. 298, 305, 24 Pac. 1015; *Hubble v. Cole*, 88 Va. 236, 29 Am. St. Rep. 718, 13 S. E. 441, 13 L. R. A. 311; *Hutchison etc. Co. v. Pinch*, 91 Mich. 156, 30 Am. St. Rep. 471, 51 N. W. 930; *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 Pac. 865; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; Sutherland on Damages, 2d ed., secs. 64, 72, 107, 120; *Masterton v. Mayor etc. of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *United States v. Behan*, 110 U. S. 338, 344, 28 L. Ed. 168, 4 Sup. Ct. Rep. 81; *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501; *Stoddard v. Treadwell*, 26 Cal. 294, 308; *Cederberg v. Robison*, 100 Cal. 98, 34 Pac. 625; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; 1 Sedgwick on Damages, pp. 116, 195, 196, 199.) Upon breach of a contract and a refusal to allow the innocent party to continue to fulfill his part, the latter may recover the full value of the contract, even though the time of the contract has not yet expired. (*Jewett v. Brooks*, 134 Mass. 505; *Hubbert v. Borden*, 6 Whart. (Pa.), 79.

Where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby; and, upon this question, evidence of profits which he was actually making is admissible. (*Lambert v. Haskell*, 80 Cal. 619, 22 Pac. 327; *Hawthorne v. Siegel*, 88 Cal. 158, 22 Am. St. Rep. 291, 25 Pac. 1114; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 Pac. 863; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; 1 Sutherland on Damages, sec. 64; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action alleges that in November, 1899, one Charles Collins, who was then the owner of a certain dairy ranch and dairy business in Silver Bow county, entered into a contract in writing with the defendants, Cohn and Fox, by which Collins agreed to sell all the milk then produced by his dairy to the defendants, and not to sell to anyone else. Collins then owned twenty-three cows, and the contract limited any increase in that number to ten per cent of the number then on hand, and limited the amount of milk which the defendants were obligated to purchase under the contract to an amount not exceeding an average of three gallons per cow per day. For all milk testing not less than three and three-fourths per cent butter fat the defendants were to pay twenty cents per gallon. The contract was for a period of five years. The complaint further alleges that on April 8, 1900, for a valuable consideration, this plaintiff purchased the dairy ranch and dairy business from Collins, and received an assignment of said contract; that such contract was valuable, and constituted an inducement to the plaintiff to purchase from Collins; that Collins fully kept and performed all the terms of the contract by him to be kept and performed prior to the assignment; that the assignment was fully ratified by the defendants; that the plaintiff delivered milk from the ranch produced by said cows to the defendants at the point designated in the contract, and continued such delivery under said contract until the 26th day of April, 1900, and that the milk so delivered was accepted and paid for by the defendants.

It is further alleged "that the plaintiff was then and there able, ready, and willing and offered to perform all and singular the terms and conditions of said contract to be kept and performed on his part during the period thereof, and is now, and will be during the entire continuance of said contract, able, ready, and willing to perform the same, and has offered to do so"; but, notwithstanding this, on the 26th day of April, 1900, "said defendants, without right, and against the will, wish, and consent of the plaintiff, and in violation of the

terms of said contract and of the assignment of the same to this plaintiff, and without any fault or violation of the terms of said contract on the part of plaintiff, refused to keep or perform said contract, and then and there refused to accept any milk whatever from the plaintiff under said contract, or to pay him therefor, and notified and informed said plaintiff that they would thereafter so refuse." It is further alleged that all the milk delivered under the contract was, and the milk which the plaintiff would be able to deliver under it during the entire term would be, of the quality for which, under the terms of the contract, the defendants agreed to pay twenty cents per gallon. The prayer of the complaint is for damages in the sum of \$6,000.

The answer admits the due execution of the contract, and sets forth a copy of it. There is a denial that Collins had kept or performed the contract, and allegations of a breach, in that the milk delivered by him was not of the quality described in the contract, and that it was not delivered within the time limited by the contract for its delivery. It is also pleaded that the plaintiff did not make delivery of the milk within the hours of each day specified in the contract for such delivery. A further defense attempted to be pleaded is that the defendants were not given thirty days' previous notice of the assignment of the contract by Collins to plaintiff. Other defenses are pleaded, but, as they are not considered in the further proceedings of the case, no mention need be made of them.

The affirmative matters pleaded in the answer are denied by reply. The reply also pleads an estoppel against the defendants with respect to noncompliance with the terms of the contract by Collins and lack of notice of the assignment of the contract to plaintiff.

The cause was set for trial for May 3, 1904. On that day, prior to the trial, the defendants filed and served upon the plaintiff a written demand for security for costs, supported by affidavit, showing that the plaintiff was then a nonresident

of the state of Montana, and orally asked the court to stay all proceedings until such security should be given. The plaintiff thereupon volunteered or promised to give security for costs as required by law within thirty days from that date, and upon this assurance the court overruled the motion for a stay and proceeded with the trial.

Upon the trial the defendants asked the court to give an instruction, numbered 3, as follows: "The court instructs the jury that in fixing damages for the nonperformance in the future you should make allowance for the uncertainties which affect all conclusions depending upon future events; and that only such evidence as is reasonably certain to extend to future events may be considered by you in fixing damages for non-performance of a contract." The court refused to give this instruction. The jury returned a verdict in favor of plaintiff for \$2,500, and from the judgment entered on such verdict and from the order denying defendants' motion for a new trial the defendant Cohn appealed.

The specifications of error relied on are: (1) The refusal of the court to stay proceedings until the cost bond was given; (2) the order of the court overruling defendants' objection to the introduction of any evidence on the part of the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action; (3) the refusal of the court to give instruction No. 3, above; (4) the admission of certain evidence; and (5) the insufficiency of the evidence to sustain the verdict. These will be considered in the order given.

1. Section 1871 of the Code of Civil Procedure provides for security for costs in case the plaintiff is a nonresident of the state, and further provides that, when required, all proceedings in the action must be stayed until an undertaking be given. Section 1872 provides that after the lapse of thirty days from the *service of notice* that security is required, etc., the action must be dismissed, if the security be not given. These sections clearly contemplate that the right to demand security for

costs from a nonresident is merely a privilege, which the defendant may insist upon; but the demand, if made, must be made upon notice given to the plaintiff. This must be so in order that any meaning be given to the language of section 1872, above.

Section 1822 of the same Code provides that when a written notice of a motion is necessary it must be given five days before the appointed time for the hearing. The record discloses that the court denied the stay upon the ground that the application for security was made too late. It was not necessary that the record show the reasons for the court's decision. As the application for security for costs was not made until the day set for the trial, and no previous notice of such demand appears to have been given, the court was justified in denying the motion, and justified for the reason which it gave—that it came too late; that is, that it was made immediately before the trial of the cause began, and without previous notice having been given.

2. It is claimed that the complaint does not state a cause of action, for the reason that it does not contain an averment that plaintiff fully complied with all the terms and conditions of the contract by him to be kept and performed. We do not understand that this allegation *in terms* is a *sine qua non* of a sufficient complaint for a breach of a contract. It is necessary that the complaint should contain this allegation, or its equivalent, in order to put the defendant in the wrong, and we think this complaint in substance does so. It shows, by the averments above set forth, that plaintiff had in fact fully kept and performed the terms of the contract by him to be kept and performed. We are therefore of the opinion that the complaint states a cause of action, and that the appellant's contention in this regard is without merit.

3. While section 4301 of the Civil Code provides that no damages can be recovered for a breach of a contract which are not clearly ascertainable in both their nature and origin, we fail to see the application of this principle to the instruction

requested. The court, by other instructions, fairly covered all the issues necessary to be submitted to the jury, and, in any event, we are of the opinion that the instruction offered is so vague and indefinite in its terms that it could not have been of any service to, but might have misled, the jury.

4. A witness—Fitzpatrick—who succeeded to the interests of Brazell in the dairy ranch and business was permitted to testify that he maintained upon the ranch from forty to sixty cows, and that he could furnish about seventy-five gallons of milk per day. It is claimed that the court erred in admitting this evidence over the objection of defendants. But the evident purpose of the testimony was to show that the ranch would support at least the number of cows called for in the contract, and that the required amount of milk mentioned therein could be produced. For this purpose it was competent, and it is hardly conceivable that it could have misled the jury in any respect whatever.

In rebuttal W. L. Irvin was called as a witness for the plaintiff, and thereupon this question was asked and these proceedings had:

“Q. During the time you were there [the milk depot], you may state, if you know, if there was any effort on the part of Mr. Cohn, or anyone acting under him, to break these contracts.

“Mr. Clinton: Objected to as incompetent, irrelevant, and immaterial, for the reason that this party was not an interested party at the time he was there, and that it was prior to the assignment of the contract from Collins to this plaintiff, and it is not competent at this time.

“The Court: He may answer this question. (Exception taken.)

“A. I don't want to answer that question unless I have to. I was there in the confidence of Mr. Cohn, and I don't want to be placed in the position of telling what happened or did not happen.

"The Court: You may answer if there was any effort to break the contract with this plaintiff. You may answer that.

"Mr. McHatton: I offer this for the purpose of showing that there was an effort on Mr. Cohn's part to break and get rid of all these contracts, and to impeach Mr. Cohn's testimony upon the stand, for he denied it.

"The Court: What about an offer to impeach on an immaterial matter? Unless he knows of an offer to break this contract with this plaintiff, or his predecessor in interest, this objection will be sustained.

"Mr. McHatton: I offer to prove by the witness on the stand—and I will state that I do not desire this offer to influence the jury at all—I offer to prove by the witness on the stand that during the month of March, 1900, Mr. Cohn, one of the defendants in this case, expressed a desire to break all of the contracts, including the contract under which the plaintiff claims, and so conduct the business with reference to the receipt of milk from the various parties that he might induce them to abandon their contract, or that he might find some excuse for refusing to take the milk; and that he conveyed this desire to the witness, and asked him to reduce the tests for the purpose of aiding what he could to make the contracts unsatisfactory to the parties delivering the milk, including Charles Collins.

"Mr. Clinton: I would like to have the court admonish the jury that they will not pay any attention to this offer.

"The Court: The jury will not take into consideration this offer.

"Mr. Clinton: And I desire to object to it on the ground that it is incompetent, irrelevant and immaterial and not rebuttal. (Objection sustained.)"

While the excuse offered by the witness for not answering the question propounded to him might imply that, if he did answer it, his answer would be prejudicial to the defendants, still a court cannot anticipate what a witness will say; and,

as a motion was not made to strike out the answer, no error can be predicated upon the order of the court as made. There is nothing in the question propounded which could have advised the court of the probable answer of the witness, and, as the witness did not in fact answer the question, and as the rulings thereafter were in favor of the defendants, there is no error of which they can complain.

5. It is said that the evidence is insufficient to support the verdict. The contract called for the sale of milk by wholesale at twenty cents per gallon if it tested not less than three and three-fourths per cent butter fat. The evidence shows that all the milk delivered by the plaintiff and his predecessor, Collins, met that requirement. The contract was only in force a short time until the alleged breach by the defendants. The record does show that after the repudiation of the contract by the defendants the plaintiff employed an additional man and team, and entered upon the business of retailing his milk in Butte; that during the first three months he lost one-half of his milk product, and the other half he was compelled to sell at a loss of four cents per gallon; that he was producing and could produce sixty gallons of milk per day; so that the damages for these three months are susceptible of exact computation, and amounted, according to plaintiff's contention, to \$648 upon the milk alone. The plaintiff testifies that until November 3, 1900, when he sold out his business, he was compelled to be at an extra expense of \$150 per month for the extra man and team, but that, aside from this expense, he was able to sell his milk so that he incurred no other loss after the first three months. This additional expense amounted to \$937. This cause was tried on May 3, 1904, or forty-two months after the plaintiff sold his business. The evidence is that during all that period of time he could have produced sixty gallons of milk per day, but, instead of being able to sell it at wholesale at twenty cents per gallon, the market price per gallon wholesale was not to exceed sixteen cents. Upon the amount of milk which he could have produced during this

period plaintiff suffered a loss of \$3,024, or a total loss of \$4,609, or, if plaintiff had continued the retail business, he would have incurred the expense of the extra man and team for this remaining portion of the contract period, which would have made the damages much greater.

It is contended, however, that after the sale of his business the plaintiff could not claim any additional damages, as he was not then in a position to carry out the contract on his part. But appellant overlooks the fact that upon the repudiation of the contract by defendants the plaintiff was not under any obligation to continue in the business, but might have disposed of it at any time thereafter, and still have maintained his action for damages for the breach of the contract on the part of the defendants. And, having a contract with defendants to sell his milk at wholesale, the plaintiff was not compelled to change the character of his business, and sell at retail, in order to keep the damages down; nor was he compelled to accept a price from the defendants lower than that agreed upon, or compute his damages upon the basis of the proposed reduction. He could insist upon compliance on the part of the defendants, or upon damages based upon the difference between the contract price and the market price of milk at wholesale. In the sale of his business the presumption is that he recovered adequate compensation for it upon the basis of the market value of milk at wholesale at that time, which was sixteen cents per gallon, and he was entitled to recover thereafter the difference between the contract price and the market price in the same locality. (Civil Code, sec. 4311.)

But it is further contended that upon no basis disclosed by the evidence could the jury have arrived at the exact amount, \$2,500. However, if the evidence would have supported a verdict for a greater amount than that returned by the jury, the appellant cannot complain that it did not fix the amount of damages at as great an amount as it might have done. There is some conflict in the evidence, but we think it is sufficient to sustain the verdict.

We have considered the other errors assigned, but are of the opinion that there is no merit in any of them. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
concur.

Rehearing denied July 29, 1905.

MCGREGOR, RESPONDENT, v. LANG, APPELLANT.

(No. 2,095.)

(Submitted May 2, 1905. Decided July 3, 1905.)

*Claim and Delivery—Pleadings—Complaint—Sufficiency—
Presumptions—Verdict — Findings — Judgment—Description
of Property.*

Claim and Delivery—Pleadings—Sufficiency of Complaint.

1. A complaint alleging that defendant at divers times prior to and within one year before a certain date wrongfully and without plaintiff's consent took certain cattle from his possession; "that on the 10th day of March, 1902, plaintiff was, ever since has been, and now is the owner of the following described cattle * * * of the value of \$1,200"; that before the commencement of the action on March 10, 1902, plaintiff demanded of defendant possession of the cattle; and that defendant still unlawfully withholds them from plaintiff's possession—was good as against a general demurrer.

Appeal—Presumptions—Evidence—Support of Verdict.

2. On appeal from a judgment in claim and delivery for cattle converted by defendant, the court must presume, in the absence of the evidence, that such evidence supported the verdict, which found that plaintiff was the owner of only part of the cattle claimed, and placed a value upon the part, averaging more per head than the sum claimed for all averaged per head.

Claim and Delivery—Verdict—Implied Findings.

3. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action.

Claim and Delivery—Judgment—Description of Property—Sufficiency.

4. In an action for claim and delivery, the jury found by general verdict that plaintiff "is the owner and entitled to the possession of the following described animals: Twenty-six steers branded $\ddagger\ddagger$ on the left side, and fish or dove tail earmarks; * * * ten heifers, branded $\ddagger\ddagger$ on the left side, and fish or dove tail earmarks. * * *". The judgment ordered that plaintiff have and recover the property described in the verdict. *Held*, that the judgment was not so vague and uncertain in the description of the property as to render it impossible to identify the animals and enable defendant to make a return thereof.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by F. McGregor against John Lang, Jr. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. Sidney M. Logan, and Messrs. Foot & Pomeroy, for Appellant.

The verdict does not find that at the time of the commencement of the action the plaintiff was the owner and entitled to the possession. In this particular the verdict and judgment are not sustained by the allegations of the complaint or the finding of the jury. (*Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885; *Gillette v. Hibbard*, 3 Mont. 419; *Largey v. Sedmon*, 3 Mont. 476; *Foster v. Wilson*, 5 Mont. 57, 2 Pac. 310; *Quirk v. Clark*, 7 Mont. 31, 14 Pac. 669; *Whiteside v. Lebcher*, 7 Mont. 478, 17 Pac. 548; 1 Freeman on Judgments, 120, 257, 258, *et seq.*; *Gregory v. Nelson*, 41 Cal. 286; *Beronio v. Ventura Lumber Co.*, 129 Cal. 236, 79 Am. St. Rep. 118, 61 Pac. 958; *Chapman v. Hughes*, 134 Cal. 654, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 475, 28 Pac. 736; *Croke v. American Nat. Bank*, 17 Colo. App. 3, 70 Pac. 229; *In re Craigie's Estate*, 24 Mont. 42, 60 Pac. 495.) "Ownership alone, without possession, is not sufficient to support the action. The action is possessory, and ownership is only incidental to the main issue." (Cobbey on Replevin, sec. 91. See, also, *Id.*, sec. 132; *Bach, Corey & Co. v. Montana L. & P. Co.*, 15 Mont. 346, 39 Pac. 291; *Cameron v. Wentworth*, 23 Mont. 78, 57 Pac. 648; *Glass v. Basin*

& *B. S. Min. Co.* (Mont.), 77 Pac. 303; *W. W. Kimball Co. v. Redfield*, 33 Or. 292, 54 Pac. 216; *Truman v. Young*, 121 Cal. 490, 53 Pac. 1073; *Babcock v. Caldwell*, 22 Mont. 461, 56 Pac. 1081; *Laubenheimer v. McDermott*, 5 Mont. 517, 6 Pac. 344.) The plaintiff must allege and prove a right of possession at the commencement of the action. (*People's Sav. Bank of Fresno v. Jones*, 114 Cal. 422, 46 Pac. 278; *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684; *Holly v. Herskell*, 112 Cal. 174, 44 Pac. 466; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885.)

This verdict does not even find an unlawful detention on the part of the defendant. It simply finds that plaintiff is *entitled to the possession*. If being silent upon the issue as to detention, the judgment is no bar to an action in conversion against the defendant, or an action in claim and delivery against his vendees. (*Campbell v. Rankin*, 2 Mont. 368; *Glass v. Basin & B. S. Min. Co.* (Mont.), 77 Pac. 303; *Klinschmidt v. Benzee*, 14 Mont. 55, 43 Am. St. Rep. 604, 35 Pac. 460.)

In this important particular the verdict does not respond to the issues. (*Jones v. Snyder*, 8 Or. 127; *Smith v. Smith*, 17 Or. 444, 21 Pac. 439.) "The verdict must describe the property with certainty. Thus where four hogs were in issue, and the jury found for plaintiff for two, without stating which two, the verdict was too uncertain to support a judgment." (Cobbey on Replevin, sec. 1066, and cases cited; see, also, sec. 1067, and cases cited, and sec. 1069.)

Messrs. Noffsinger & Folsom, Mr. B. J. McIntire, and Mr. W. H. Poorman, for Respondent.

"The complaint must contain an averment that the plaintiff is the owner of the property, or that the title is in him, or that the right of possession is in him at the time of the commencement of the suit." (*Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Pattison v. Adams*, 7 Hill, 126, reported in 42 Am. Dec. 59, which is a leading case; *Luther v. Arnold*, 3

Rich. 24, 62 Am. Dec. 422; *Simmon v. Lyons*, 55 N. Y. 671; *Pope v. Hanmer*, 74 N. Y. 240; *Zirngibl v. Calumet & C. Canal etc. Co.*, 157 Ill. 430, 42 N. E. 431; *Plew v. Missouri etc. Ry. Co.* (Tex. Civ. App.), 29 S. W. 403; *Scofield v. Whitelegge*, 49 N. Y. 259; *Vogel v. Babcock*, 1 Abb. Pr. 167.)

From the allegation of ownership, right of possession is presumed. The pleading must state the ultimate fact, that is, ownership, or if not an owner, a state of facts showing a special property in the property sought to be recovered, which entitles plaintiff to its possession. (18 Ency. of Pl. & Pr. 537; *Wilmot v. Lyon*, 7 Ohio C. C. Dec. 397; *Robinson v. Fitch*, 26 Ohio St. 659.)

The verdict complies with section 1103 of the Code of Civil Procedure. (See *Prescott v. Heilner*, 13 Or. 200, 9 Pac. 403; *Stephens v. Scott*, 13 Ind. 515; *Onstatt v. Ream*, 30 Ind. 259, 95 Am. Dec. 695; *Johnson v. Fraser*, 2 Idaho, (404), 371, 18 Pac. 48; *Corbell v. Childers*, 17 Or. 528, 21 Pac. 670; *Cassell v. Western Stage Co.*, 12 Iowa, 47; *Branstetter v. Morgan*, 3 N. D. 290, 55 N. W. 758; *Etchepare v. Aguirre*, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an action in claim and delivery, wherein the plaintiff, in an imperfect complaint, alleges that the defendant "at divers times prior to and within one year before the 1st day of March, 1902, * * * without plaintiff's consent, wrongfully took" certain cattle from his possession, and that on the 10th day of March, 1902, "the plaintiff was, ever since has been, and now is the owner of the following described cattle: Thirty-five head of range cattle, consisting of steers and cows, branded on left side, and earmarks of fish or dove tail, of the value of \$1,200, and thirteen yearling heifers with the same brands and marks as aforesaid, and of the value of \$326; that before the commencement of this action, to-wit, on or about the 10th

day of March, 1902, the plaintiff demanded of the defendant possession of said cattle"; that the defendant "still unlawfully and wrongfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage," etc.

The defendant answered, denying each and every allegation of the complaint. There was not any demurrer. The jury found by general verdict that plaintiff "is the owner and entitled to the possession of the following described animals: Twenty-six steers branded $\ddagger\ddagger$ on the left side, and fish or dove tail earmarks, of the value of \$42.50 each, and of the aggregate value of \$1,105.00; ten heifers, branded $\ddagger\ddagger$ on the left side, and fish or dove tail earmarks, of the value of \$25 each, and of the aggregate value of \$250. * * *" The jury did not award any damages for the detention of the property.

The judgment ordered that the plaintiff have and recover the property described in the verdict, or be compensated by the defendant according to the value fixed in the verdict. From this judgment the defendant appealed.

The appellant specifies as error, first, that the court erred in entering judgment, for that the complaint does not state facts sufficient to constitute a cause of action, alleging four grounds: (1) That there is not any allegation that the plaintiff was the owner of any of the cattle at the time of the taking; (2) that there is not any allegation that at the time of the alleged trespass or of the commencement of the action the plaintiff was in possession or entitled to the possession of any of the cattle; (3) that there is not any allegation that at any time before or subsequent to the commencement of the action the plaintiff was or is entitled to the possession of the property; and (4) that the complaint is so vague, uncertain and indefinite in the description and identification of the property as to wholly fail to sustain the judgment.

We have been somewhat loath to declare the complaint sufficient, but we believe it was not vulnerable upon general demurrer; being of the opinion, however, that, if a special de-

murrer had been made, it should have been sustained. By fair intendment, we think that the complaint implies that at the time of the demand, on the 10th of March, the plaintiff was the owner, and thereafter was such, and entitled to the possession, up to and at the time of the commencement of the action. Although the complaint was not filed until nearly two months after March 10, 1902, yet it does not appear that it was not verified upon the day the action was commenced, and we infer that the allegations as to ownership and wrongful detention relate to the time of the commencement of the action as well as to the time prior.

The second specification is that the court erred in entering judgment on the verdict, for that the verdict is so vague, indefinite, and uncertain as to fail to sustain the judgment. Seven reasons are assigned. Some of these reasons go to the fact that the verdict does not find for the plaintiff in the full number of animals claimed; the number mentioned in the verdict being twelve less than those demanded in the complaint. This being an appeal from the judgment, and we not having the evidence before us, we must presume that it showed that these were all the animals defendant had that belonged to the plaintiff.

Under this specification, appellant complains that the verdict does not find that at the time of the commencement of the action the plaintiff was the owner or entitled to the possession of the property. We do not understand that in a verdict a jury is expected to make any such statement in terms. A general verdict implies a finding upon each material issue.

Further complaint is made under this head that the verdict is not responsive to the issues, in that it places on the twenty-nine (twenty-six?) head of steers a valuation in excess of the amount alleged in the complaint. Plaintiff alleges in the complaint that there were thirty-five steers and cows, of the value of \$1,200. The average value of these thirty-five animals is less than the value per head found by the jury as the value of each of the twenty-six steers mentioned in the verdict, but their

total value, to wit, \$1,105, is less than the total value of the thirty-five animals of which the twenty-six were a part. It is to be presumed that the evidence supports the verdict in this behalf.

As to the other reasons under this head referring to the verdict, it is sufficient to say that we find that the verdict is supported by the pleadings, and presumably by the evidence.

The third, fourth, and fifth specifications attack the instructions of the court, which are few in number, and not numbered. We have examined the instructions, and find that they are not prejudicial to the defendant, but that, if judgment had gone against the plaintiff, he might have found fault with them, for the reason that they require the jury to find more than it was necessary for him to prove.

Although there is not any express allegation in the complaint that at the time of the taking the plaintiff was the owner, or any express statement that he was entitled to the possession, of the property, still there is a declaration that at the time of the demand he was the owner, and was such up to the time of the making of the complaint, and, in the absence in the record of anything to the contrary, presumably up to the time of the commencement of the action; and it is fairly implied in the complaint that he was entitled to the immediate possession at the time of the commencement of the action, and that he was being unlawfully kept out of such possession by the defendant. The complaint seems to be one in *detinet*, and not in *cepit*. Such being the case, it would seem that the court erred against the plaintiff, and not the defendant, when it instructed the jury to find as to whether the plaintiff was "at the times mentioned the owner of any of the cattle"; thus erring against the plaintiff in requiring that he prove that he was the owner at least at one date immaterial in a proceeding in *detinet*.

We do not think that the judgment is, as appellant complains, so vague and uncertain in the description of the property as to render it impossible to identify the animals and enable the defendant to make a return thereof. The presumption,

of course, is that the evidence showed that the cattle mentioned in the complaint were marked and branded as stated in the verdict, and that the number of animals found by the jury were all that the defendant had, so marked and branded, belonging to the plaintiff.

We do not find any error prejudicial to the defendant, and the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied October 12, 1905.

MEARS, RESPONDENT, v. SHAW, SHERIFF, APPELLANT.

(No. 2,111.)

(Submitted May 6, 1905. Decided July 3, 1905.)

Claim and Delivery—Pleading—Judgments—Necessary Allegations.

Judgments—How to be Plead.

1. Under Code of Civil Procedure, section 745, providing that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceedings then pending in that court, under the provisions of the Bankruptcy Act of July 1, 1898, was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made."

Claim and Delivery—Complaint—Insufficiency.

2. *Obiter*: A complaint in claim and delivery is fatally defective which upon its face shows that the defendant did not have the property in his possession at the time the action was brought.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by J. L. Mears, as trustee of the Deerfield Mercantile Company, a bankrupt, against Thomas M. Shaw, sheriff of

Fergus county. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Messrs. Kirk & Clinton, for Appellant.

Messrs. Huntoon, Worden & Smith and *Mr. H. S. Hepner*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery. The property which was the subject of litigation consisted of merchandise. The complaint alleges that in September, 1902, Myers and Huson were copartners, doing business in Fergus county as the Deerfield Mercantile Company. Paragraph 2 of the complaint is as follows: "That on or about the said 13th day of September, 1902, the said Deerfield Mercantile Company and the said Addison Myers and E. A. Huson were each and all adjudged bankrupts by the district court of the United States in and for the district of Montana, at a term of said court held at the city of Helena, Montana, in proceedings then and there pending in said court, under the provisions of an Act of the Congress of the United States entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898."

It is alleged that on or about October 17, 1902, this plaintiff was elected trustee of said bankrupt estate, and that he immediately thereafter qualified and assumed the duties of his trust. It is then alleged that at the times mentioned in the complaint the defendant was sheriff of Fergus county; that on August 13, 1902, he seized the property in controversy under and by virtue of a writ of attachment issued from the district court of Fergus county in an action wherein Louis S. Cohn was plaintiff and the Deerfield Mercantile Company was defendant; that a judgment in said action was entered on September 10, 1902, and execution issued thereon; that under such

execution the defendant sheriff sold the goods in controversy on September 16, 17 and 18, 1902. The value of the property at the time of the sale and at the date of the commencement of this action is alleged to have been \$1,360.19. It is further alleged that on October 20, 1902, and on February 13, 1903, the plaintiff demanded from the defendant Shaw the goods, wares, merchandise, personal property, and money so levied upon and held by him belonging to the said Deerfield Mercantile Company, but that he defendant refused to deliver the same to the plaintiff. The prayer of the complaint is for the return of the property, or for \$1,360.19, its value, in case return could not be had. To this complaint the defendant interposed a general demurrer, which was overruled, and thereafter filed his answer, and to this answer the plaintiff replied.

Upon the trial the jury returned a verdict in favor of the plaintiff, and fixed the value of the property at \$1,050. Upon this verdict, judgment was rendered and entered, and from the judgment, and from an order overruling his motion for a new trial, the defendant appealed.

Several errors are assigned, but only one will be considered, as it is determinative of these appeals, and as we think the others are without merit.

Does the complaint state a cause of action? The plaintiff does not sue in his individual capacity, but as trustee in bankruptcy. Therefore, his complaint must contain averments sufficient to entitle him to standing in court in such representative capacity. His election as trustee depended upon the prior adjudication in bankruptcy, a reference of the matter to a referee, a meeting of the creditors, and his selection as such trustee. In order to avoid the necessity of pleading the various steps taken in the course of the litigation, section 745 of the Code of Civil Procedure was adopted. It provides: "In pleading a judgment, or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. * * * "

In construing section 456 of the California Code of Civil Procedure, which is identical with our section 745, above, the supreme court of California, in *Young v. Wright*, 52 Cal. 407, said: "But the answer avers that the judgment was 'duly rendered,' and it is contended that this was sufficient under section 456 of the Code of Civil Procedure. That section provides that 'in pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.' A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerating him from an obligation which would otherwise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved, and they must be strictly performed. In this case the averment is not that the judgment was duly 'given or made,' but that it was duly 'rendered,' and we are inclined to think these are not equivalent terms. A judgment is duly 'rendered' when it is duly pronounced and ordered to be entered. (*Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Relyea*, 32 Cal. 159.) But a judgment duly 'made or given' is a complete judgment, properly entered in the judgment-book, so that it may be pleaded in bar of another action. But whether this be so or not, the statute defines the precise terms on which a party pleading a judgment may be excused from stating in his pleading the jurisdictional facts; and to prevent the necessity of construing doubtful phrases, in order to determine whether they are of equivalent import, the better practice is to require the pleader in such cases to pursue the statute strictly." This language was quoted with approval by this court in *Harmon v. Comstock H. & C. Co.*, 9 Mont. 243, 23 Pac. 470, and the doctrine therein announced has become firmly fixed as the rule of law in this state, and is as applicable in this case as if a final judgment was attempted to be pleaded and relied upon. (*Weaver v. English*, 11 Mont. 84, 27 Pac. 396; *Walter v. Mitchell*, 25 Mont. 385, 65 Pac. 5; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044.)

Tested by this rule, the complaint fails to state a cause of action. It is not alleged that any order of the United States court was ever *duly given or made* adjudging the Deerfield Mercantile Company, or the individual partners, bankrupts, and, under the decisions above, the allegations of paragraph 2 of the complaint herein quoted are wholly insufficient for that purpose.

The question as to whether the complaint is not also fatally defective as a complaint in claim and delivery, in that it shows upon its face that the defendant did not have the property in his possession at the time this action was brought, but had disposed of it long prior thereto, is not urged here, and nothing need be said further than to call the attention of the trial court and counsel to this matter.

For the reasons given, the judgment and order are reversed and the cause remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN
CONCUR.

STATE EX REL. HEINZE, RELATOR, v. DISTRICT COURT
OF SECOND JUDICIAL DISTRICT ET AL., RESPOND-
ENTS.

(No. 2,213.)

(Submitted June 6, 1905. Decided July 3, 1905.)

*Writ of Supervisory Control—When Issued—District Courts
—When Issuance Premature.*

Supervisory Control—When It will Lie.

1. The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical.

District Courts—Supervisory Control—When Issuance Premature.

2. While the lower court is proceeding within jurisdiction and before it has exceeded it, the invocation of action on the part of the supreme court by writ of supervisory control or otherwise is premature.

ORIGINAL application for a writ of supervisory control by the state, on the relation of F. Augustus Heinze, against the district court of the second judicial district and George M. Bourquin, a judge thereof. Dismissed.

Mr. C. R. Leonard, Mr. J. M. Denny, and Mr. M. S. Gunn,
for relator.

MR. JUSTICE MILBURN delivered the opinion of the court.

The petitioner asks for a writ of supervisory control directed to the district court of Silver Bow county and Honorable George M. Bourquin, a judge thereof. The facts relied upon all appear in a former case determined by this court, wherein a writ of prohibition was asked and refused. (*State ex rel. Heinze v. District Court et al.*, 32 Mont. 394, 80 Pac. 673.)

The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical. In the former proceeding above referred to, we (Mr. Justice Holloway dissenting) declared that it was clearly the duty of the court to take up the motion to strike out the answer and pass upon it. We have not changed our opinion as to such being the duty of the judge and court, and therefore we may not in this proceeding do what we refused to do in the matter of the application for a writ of prohibition above referred to.

If the statute (section 3306 of the Code of Civil Procedure) be invalid, as unconstitutional, and, acting under it, the court below shall strike the answer, and proceed to enter up judg-

ment against the petitioner as upon default of answer, then it will be the proper time to invoke the action of this court in a proper proceeding. To ask for any action on our part while the lower court is proceeding within its jurisdiction, and before it has exceeded its jurisdiction, is premature.

For the reasons above stated, the writ of supervisory control was on June 2, 1905, denied by this court, and the proceeding dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I concur in the result reached, but for a reason different from that expressed by the majority of the court in the foregoing opinion. In *State ex rel. Heinze v. District Court*, above, I expressed my opinion that prohibition was an available remedy, and that the writ should issue in that proceeding. I am still of that opinion, and therefore think that the writ of supervisory control should not issue now.

OSMERS, RESPONDENT, v. FUREY ET AL., APPELLANTS.

(No. 2,105.)

(Submitted May 5, 1905. Decided July 3, 1905.)

Landlord and Tenant—Eviction—Actual and Constructive—Abandonment — Justification—Opinion Evidence—Claim and Delivery—Order of Proof—Burden of Proof—Counterclaims—Instructions—Damages—New Trial—Separable Issues.

Landlord and Tenant—Actual and Constructive Eviction—Justification—Abandonment.

1. Where defendant entered on premises, leased by him to plaintiff, and proceeded to build an addition to the rear of the building without consulting the lessee, in the course of which operations the steps from the rear into the house were removed, thereby preventing

32	581
39	276
139	279

access from the back yard, and a chimney used by lodgers in the basement destroyed, compelling them to seek lodging elsewhere, while other lodgers left the premises by reason of the noise incident to the work, the plaintiff, having been actually evicted from a part of the premises and constructively from the rest by defendant's action, was justified in abandoning the building, and discharged from any obligation to pay rent for the remainder of the term.

Landlord and Tenant—Eviction—Defense to Action for Rent.

2. Eviction by the landlord is a complete defense to an action for rent, the consideration for the agreement having failed by the wrongful act of the landlord in depriving the tenant of the beneficial use of the property.

Opinion Evidence—Knowledge of Witness—Competency.

3. Plaintiff testified, in an action in claim and delivery to recover furniture wrongfully seized by her landlord to satisfy a claim for rent, that she purchased most of it from a prior lessee, about fourteen months before the seizure, for \$1,600, and had added to it new furniture to the amount of \$400; that she knew the value of the furniture, and that it was worth \$2,000; that she had once before purchased similar property; that none of it had deteriorated appreciably by use, and that it was still worth the purchase price to any one desiring to buy such property, whether in the leased house or not. *Held*, that the knowledge and experience thus evinced by her was sufficient to permit her to state her opinion.

Claim and Delivery—Measure of Damages—Market Value.

4. The amount plaintiff in claim and delivery may recover, in case a redelivery cannot be had, is the market value of the property when the taking occurred or the wrongful detention began.

Claim and Delivery—Measure of Damages—Cost Price.

5. In ascertaining the market value of personalty in claim and delivery, the cost price may be considered as one fact tending to establish it.

Claim and Delivery—Order of Proof—Burden of Proof—Justification—Rebuttal—Practice.

6. In an action in claim and delivery for furniture of plaintiff seized by defendant under an alleged lien for rent, it was only incumbent on plaintiff, in making her case in chief, to prove ownership of the furniture, and the taking and detention by defendants against her consent, the burden of justification being on defendants, and, after introduction of their evidence, plaintiff could in rebuttal show the eviction, and that no rent was due.

Claim and Delivery—Counterclaims—Money Judgment—Instructions.

7. *Held*, in an action in claim and delivery for furniture of plaintiff, seized by defendant lessor under an alleged lien for rent, wherein defendant set up a counterclaim for rent, damages to the leased premises, etc., that, as a claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, in no way tended to defeat or diminish plaintiff's right to recover possession of the property, an instruction to disregard evidence in support of defendant's counterclaim, except so far as showing rent due at the time of the taking, which would be a justification therefor, was correct.

Claim and Delivery—Cause of Action—Subject of the Action.

8. The transaction set forth in the complaint, in an action in claim and delivery for furniture of plaintiff lessee seized by defendant lessor under an alleged lien for rent, being the wrongful taking of the property, the cause of action alleged in defendants' counterclaim

for water rent, plumbing, etc., or damages to the building etc., did not arise out of the transaction, nor was it connected with the subject of the action.

Motion to Strike Out Counterclaim.

9. On the filing of an answer improperly interposing a counterclaim, plaintiff's motion to strike out the counterclaim should have been allowed.

Instructions.

10. Where instructions, taken as a whole, fairly state the law applicable to a case, appellant has no cause to complain.

Claim and Delivery—Judgment—Damages—Remittal—Effect—New Trial.

11. In an action in claim and delivery for property alleged to have been wrongfully seized by defendant, there was no evidence to sustain a finding for damages for the taking, and plaintiff remitted damages awarded by the verdict, judgment being entered in the alternative for the return of the property or for the value thereof. *Held* that, as defendants secured all the relief to which they were entitled, the fact that the usual course in such cases was not pursued was not sufficient ground for a new trial.

Claim and Delivery—Separable Issues.

12. Where an issue as to damages is clearly separable from the other issues in a case, the supreme court, in order to correct a judgment including them, will order a new trial of such issue only.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Dora Osmers against James B. Furey, J. H. Steele and others. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Affirmed.

**STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE
OPINION:**

Action in claim and delivery to recover the possession of certain lodging-house furniture alleged to have been wrongfully taken from the plaintiff, and of the value, as averred, of \$2,000, and for damages in the sum of \$500, for that by the wrongful taking the plaintiff's business was destroyed, and she was put to great cost and expense.

The complaint is in the ordinary form. The defendants Furey, McGuigan, and Hughes filed a separate answer, putting in issue all the material allegations of the complaint. The answer of defendant Steele, after joining issue upon

these allegations, sets up two separate affirmative defenses. The first alleges, in substance, by way of justification, that the plaintiff was on July 30, 1901, the date of the alleged wrongful taking, the lessee of the defendant Steele, and as such was occupying a building belonging to the defendant, situate on lot 5, block 13, of the city of Butte, with one-half of a small yard in the rear thereof, and that she had said property therein in her possession; that the term of the lease was for twenty-two months from January 1, 1900; that the writing provided that the rent should be due and payable in advance on the first day of each month in installments of \$150; that it required the plaintiff, as additional rent, to pay all water, electric light, and fuel bills, and make all necessary repairs of pipes, wires, glass, etc., at her own expense, and, at the time such repairs were made, to inform the persons employed to furnish work and material for that purpose that the lessee only was chargeable for the price of them; and that in case any installment of rent was not paid at any time for three days after it should fall due, or if any of the covenants of the lease, were violated, the lease should be forfeited, and the lessor would be entitled to enter and take possession.

It is further alleged that, in order to secure the payment of the rent and the performance of the other conditions of the lease, there was a provision inserted therein giving the defendant a lien upon all the furniture described in the complaint, with authority to the defendant, when any installment of rent was due and unpaid for three days, to seize and sell it at public auction, as under execution, to satisfy defendant's claim for such rent. It is further alleged that on July 30, 1901, the plaintiff was in arrears on the payment of the July installment of rent, and also of the water rate, and that defendant on that day caused the property to be seized by the other defendants, and thereafter to be sold for the payment of such arrears, and also for the payment of the installment of rent due for the month of August and payable on the first of that month, and that the proceeds were applied toward the payment of the amounts thus due the defendant.

The third defense alleges, in substance, by way of counterclaim, that, though the rent for July was partly in arrears, the plaintiff attempted to vacate the building and remove the furniture therefrom; that she thereafter failed to pay any installment of rent for the remaining portion of the term; that the building had fallen into disrepair during plaintiff's occupancy, and had to be restored by defendant Steele at a cost to him of \$209.21, which the plaintiff failed and refused to pay; that the furniture was sold under the terms of the lease by the defendants Furey, McGuigan, and Hughes, the sheriff of Silver Bow county and his deputies, for the defendant Steele; and that after he had credited upon the amount of the sale the cost of sale, the rent due, and the amount paid out by defendant Steele for repairs, there remained due him a balance of \$169.55. For this sum judgment is demanded.

In her replication the plaintiff, besides averring a full performance on her part of all the conditions and covenants of the lease up to July 30, 1901, denied all the material allegations of the affirmative defense, and then alleged that on July 30, 1901, while the plaintiff was in the quiet and peaceable possession of the premises, the defendant Steele wrongfully entered thereon, and ousted and ejected her therefrom, and thereupon wrongfully, by his agents, the other defendants, seized the property as alleged in the complaint.

A trial upon the issues thus framed resulted in a verdict for the plaintiff that she was entitled to recover the possession of the property, that it was of the value of \$1,500, and that she had suffered damage to the amount of \$500 by reason of the wrongful taking. Judgment was entered that the plaintiff recover the possession of the property, or, in case return could not be had, that she recover from the defendants the sum of \$1,500, the plaintiff having remitted the damages.

The provision of the lease upon which the defendants rely as the ground of their justification and as the basis of defendant Steele's counterclaim is as follows: "Said lessee does hereby give and grant to the said lessor a lien upon all of the furni-

ture, fixtures and other property now situate in said premises, owned and held by her on the first day of January, 1900, as described in Exhibit 'A' hereto attached, or which may thereafter be purchased, acquired or held by her and be placed by her in the said premises, for all unpaid amounts of rent hereinabove specified, now due, owing and unpaid, on and by virtue of the terms hereof. And in the event any installment of rent shall remain unpaid for a period of three days or longer after the same should have been paid, then the said lessor may take possession of the same and sell the same at public auction; if he so elect may direct the sheriff of the county of Silver Bow, Montana, to foreclose the said lien by posting, in accordance with the law governing the sale of personal property under execution." This appeal is from the judgment and an order denying the defendants a new trial.

Mr. John J. McHatton, and Mr. W. E. Carroll, for Appellants.

The plaintiff did not show any knowledge of the value of the property in question, and it was error for the court to overrule the objections to her testifying regarding the same. The price which she paid for the property, even though there had not been included in this price the lease and business, was not proper evidence of the value of the property at the time it was taken. She was not qualified to testify as to value. (*Story v. Maclay*, 3 Mont. 483; *Leggat v. Leggat*, 13 Mont. 190-194, 33 Pac. 5; *Dietrichs v. Lincoln etc. R. R. Co.*, 12 Neb. 225, 10 N. W. 718; *San Antonio & A. P. R. Co. v. Rubey*, 80 Tex. 172, 15 S. W. 1040; *St. Louis etc. Ry. Co. v. St. Louis Stock Yards Co.*, 120 Mo. 541, 25 S. W. 399; *Pittsburgh etc. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764.) A cause of action arising out of the contract or transaction set forth in the complaint may be set up as a counterclaim. (Code of Civil Proc., secs. 690, 691; 19 Ency. of Pl. & Pr. 756, notes; *Davis v. Davis*, 9 Mont. 267, 273, 275, 23 Pac. 715; *Collier v. Erwin*, 3 Mont. 142, 145.)

The words "subject of the action" should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked. (Code of Civil Proc., sec. 691; Moak's Van Sant on Pleading, 627, 628; Pomeroy's Code Remedies, secs. 767, 788, 789, notes, 791; *Deford v. Hutchison*, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257.)

An answer alleging the circumstances under which the goods sued for came into defendant's possession, and that the defendant was entitled to at the time, and that the chattels were delivered to and sold by him as security for such debt, and that the same were held under the lien thus created by the pledge, and demanding judgment for such debt, states a counterclaim. (Pomeroy's Code Remedies, sec. 791; *Thompson v. Kessel*, 30 N.Y. 383.)

Defendant had a right to prove his lien, to defeat the plaintiff's alleged right of possession of the goods in controversy, and may therefore counterclaim and recover judgment for any amount due him under the lease. The counterclaim is certainly connected with the subject of the action. (*Deford v. Hutchison*, *supra*; *McArthur v. Green Bay & Miss. Canal Co.*, 34 Wis. 139, 146.) Counterclaim authorized by the Code embraces both setoff and recoupment, and is broader and more comprehensive than either. (*Vassear v. Livingston*, 13 N. Y. 248, 256.) Under the lease in this case, it was the duty of the plaintiff to pay the water, light and fuel charges, as part of the consideration therefor. (*Ellis v. Bradbury*, 75 Cal. 234, 17 Pac. 3.)

It was likewise the duty of the plaintiff to pay all damages occasioned by the plaintiff to the defendant. The damages claimed for injuries to the property occurred by reason of the removal of the property by the plaintiff from the premises. The defendant Steele had a lien. (Civil Code, sec. 3730 *et seq.*; 19 Am. & Eng. Ency. of Law, 2d ed., pp. 13, 14; 18 Id., pp. 650, 651, note 5, 654, 656.) Reservation of a lien on the tenant's

property in the lease does not waive statutory lien. (*Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787.) A lien reserved by a lease is in the nature of a chattel mortgage. (19 Am. & Eng. Ency. of Law, 2d ed., p. 328; Civil Code, sec. 3871; *Bennett Bros. v. Tam*, 24 Mont. 457, 62 Pac. 780.)

Messrs. McBride & McBride, and *Mr. James E. Murray*, for Respondent.

The matters set up by defendant, in his separate answer, purporting to constitute a counterclaim, do not, in any wise, arise, or grow out of, the transaction complained of by plaintiff. The transaction concerning which plaintiff complains is the wrongful trespass and conversion of the furniture. The so-called counterclaim of the defendant grows out of the alleged violation of certain covenants of a lease, and surely is not connected with, or does not arise out of, the transaction set forth in the complaint. (*Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 603; *Bartlett v. Farington*, 120 Mass. 285; *Potter v. Lohse* (Mont.), 77 Pac. 419; *Lehmair v. Griswold*, 40 N. Y. Super. Ct. (8 Jones & S.) 100; *G. H. Mfg. Co. v. Hall*, 61 N. Y. 226; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 485; *Edgerton v. Page*, 20 N. Y. 283; *People v. Dennison*, 84 N. Y. 279.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court:

1. It will be observed that under the terms of the lease no lien was granted to secure the payment of any moneys which the lessor might be compelled to advance in order to put the property in repair either during or after the expiration of the term. The lessor was authorized to re-enter and forfeit the lease if the plaintiff failed to pay any installment of rent according to its terms, or to make or pay for any necessary repairs; but there is no stipulation in the clause quoted, providing for a lien, that plaintiff's furniture should be seized and sold to reimburse the lessor for any outlay made by him in this regard. The lien was clearly imposed by the terms of the lease for the

purpose of securing the monthly installments of rent only, for there is no other stipulation as to the matters secured by it than the one quoted above. Nor is there any agreement recited anywhere in the lease that the repairs were to be considered additional rent. Such being the stipulation of the parties, the allegation of the defendant Steele, purporting to set forth in his separate answer the substance of the lease, to the effect that it was stipulated that the repairs done or to be done by plaintiff at her own expense were additional rents, finds no justification under the covenants or agreements therein.

Apart from the issue as to damages and the phase of the case presented by the counterclaim, which will be noticed hereafter, the only issue involved was whether the taking by the defendants was wrongful. On this issue the jury found for the plaintiff, and we think properly so, upon the evidence, for, though there was some conflict as to whether there was still due a small balance on the July installment of rent, the evidence shows a decided preponderance in favor of plaintiff's contention that nothing was due on that or any other account. The evidence tends to show also that about July 16th the defendant Steele, desiring to build some sort of an addition to the rear of the building, entered upon the back yard without consulting plaintiff, and began and continued his operations there until July 30th, when the plaintiff abandoned the place and sought to move out the furniture. The workmen employed took away the steps, preventing access to the building from the yard, and excavated for the foundation of the new structure to the depth of several feet. They also destroyed a chimney, which was used by plaintiff's lodgers in the basement, so that they were compelled to seek lodging elsewhere. Other lodgers left because of the noise incident to the work. So that not only was plaintiff justified in abandoning the premises on account of this action of Steele, but, the rent for July having been fully paid, the furniture could not be seized or held by Steele to enforce the payment of installments thereafter falling due. The plaintiff was by these acts of Steele actually evicted from a part of

the premises, and constructively from the rest, and was at liberty to abandon possession, and thus be discharged from any obligation to pay rent for the remainder of the term.

Eviction by the landlord is a complete defense to an action for rent. (*York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454; 18 Am. & Eng. Ency. of Law, 2d ed., 300; 1 Taylor's Landlord and Tenant, 9th ed., 377.) The reason for the rule is that, the tenant having been deprived of the beneficial use of the property by the wrongful act of the landlord, the consideration for the agreement to pay rent has failed. (*Dyett v. Pendleton*, 8 Cow. 727.) This is common sense as well as law, for "the usual words of demise import a covenant for quiet enjoyment, which signifies that the tenant shall not be evicted by title paramount, and also that his possession shall not be disturbed by the acts or wrongful omissions of the lessor." (*York v. Steward*, *supra*.)

It is clear, therefore, that, upon the facts as found by the jury, the defendants were guilty of a trespass in seizing the furniture, and that the verdict as to plaintiff's right to the possession is fully supported by the evidence. These remarks dispose of the contention of appellants that the evidence is insufficient to sustain the verdict upon this issue.

2. The plaintiff testified that most of the furniture had been purchased by her from a prior lessee for \$1,600 about fourteen months before the seizure, and that soon after her purchase she had added to it to the amount of \$400 by the purchase of new furniture. She stated that she knew the value of the furniture, and that it was worth \$2,000. The testimony was admitted, over the objection of defendants that it was incompetent in that the plaintiff had not shown sufficient knowledge to give her opinion, and that the purchase price paid by her did not in any way tend to show the market value of it. The witness stated further that she had been using the greater portion of the furniture for about fourteen months, having bought it when nearly new from one Eva Althoff, who had assigned the lease to her;

that it was in good condition; that she had once before purchased property of the same sort; that she had added to it about \$400 worth of other furniture entirely new; that none of it had deteriorated appreciably by use; and, after stating the price she paid for it (\$2,000), that it was still worth that amount to any person who desired to buy property of that character, whether in the house, as when she purchased it, or not. While the knowledge and experience thus evinced by her was not extensive, still it was sufficient to permit her to state her opinion. (*Holland v. Huston*, 20 Mont. 84, 49 Pac. 390; *Emerson v. Bigler*, 21 Mont. 200, 53 Pac. 621; *Porter v. Hawkins*, 27 Mont. 486, 71 Pac. 664.)

In claim and delivery the purpose is to obtain possession of the property, with damages for its detention. The value to be found by the jury which the plaintiff may recover, in case a re-delivery cannot be had, is the market value at the time the taking occurred or the wrongful detention began. But in arriving at this value it is always proper to take into consideration the cost price as one fact tending to establish it. (*Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729; *Luse v. Jones*, 39 N. J. L. 708; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Boggan v. Horne*, 97 N. C. 268, 2 S. E. 224; *Roberts v. Dunn*, 71 Ill. 46; *Small v. Pool*, 30 N. C. 47; *McPeters v. Ray*, 85 N. C. 462.) This evidence was admissible upon the same principle as was evidence of the price which the property brought at the sale made by the sheriff. Neither was conclusive, but both were proper to be considered by the jury. Testimony of other witnesses as to the value was objected to upon similar grounds, but, for the reasons already stated, we think the court committed no error in admitting it.

3. It was only incumbent upon the plaintiff, in making her case in chief, to show her ownership of the furniture, and the taking and detention by defendants against her consent. The burden of justification was upon the defendants. When they had introduced their evidence, the plaintiff had a right to rebut their case by showing the eviction, and that nothing was due

on account of rent. Plaintiff's counsel, however, introduced as a part of their case in chief, the lease, and the evidence tending to show the eviction. The defendants objected to this evidence, on the ground that it was not relevant to any issue in the case. There is no merit in this objection. As already stated, the eviction by her landlord justified her abandonment of the leased premises, and discharged her from any obligation to pay any other installment of rent. While the proper order of proof was not pursued, still the evidence was relevant to the issues. Besides, the questions bringing out a portion of this evidence were put to the witness on redirect examination to give her an opportunity to explain statements brought out on cross-examination by counsel for defendants, to the effect that when the seizure was made by defendants she was engaged in moving the furniture from the house. The witness clearly had a right to explain.

4. Touching the counterclaim of the defendant Steele, the court, at the request of plaintiff, instructed the jury as follows: "Claims of water rent, plumbing, electric light bills, or damages of any nature to the building, or alleged breaches of any terms of the lease under which plaintiff held possession of defendant's premises, cannot in any wise be treated as proper matters of counterclaim, or treated as any defense to plaintiff's cause of action, except, however, the nonpayment of rent, which would constitute a defense or justify defendant's taking of said furniture; and you are instructed to disregard all testimony with reference to alleged breaches of the contract, other than the nonpayment of rent." In this instruction the jury were told in substance to disregard evidence tending to support the counterclaim of defendant Steele, except so far as it tended to show any rent due under the terms of the lease, and, if it were shown that rent was due at the time the defendants took the property, this would be a justification of the taking. Defendants complain that this was error.

The issue involved is the right of plaintiff to recover the possession of the property, or its value. The defendants could

not therefore be allowed to set up a counterclaim for a money judgment, and thus defeat the right of plaintiff to recover such possession. The nature of the action does not permit the interposition of such a defense. Under section 691 of the Code of Civil Procedure, providing for the interposition of counterclaims as a defense, such counterclaims only are allowed as tend in some way to diminish or defeat the plaintiff's recovery. A claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, tends in no way to defeat or diminish the plaintiff's right of recovery of the possession of the property wrongfully taken from her.

If in a given case the counterclaim be established, and the plaintiff nevertheless be found to be entitled to recover the property, the result would be two independent judgments, the one in no way tending to modify or interfere with the other. If the defendant should succeed in establishing his right of possession to the property, as well as his counterclaim, he would have two independent judgments. The statute does not contemplate such a result. (Pomeroy's Code Remedies, section 643.) Besides, the cause of action alleged in the counterclaim did not arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, nor is it connected with the subject of the action. The transaction set forth is the wrongful taking of the property. While rent due for the use of the premises would have been a complete justification, the fact that it was due did not arise out of the wrongful seizure, nor was it in any way connected with it. It was the result of a breach of the lease, as were all the other items alleged as elements for defendant's claim. In *Collier v. Ervin*, 3 Mont. 142, it was said by this court: "The words in our statute, 'subject of the action,' should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked." (See, also, *Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419, and cases cited.)

Upon the filing of the answer, the plaintiff moved to have the counterclaim stricken out. The motion should have been sustained. The instruction excluded from the jury the consideration of all questions arising in connection with it, and was therefore correct. Whether the evidence was or was not sufficient to sustain the counterclaim is wholly immaterial.

Complaint is made of other instructions; but, taking them all together, we think they fairly state the law applicable to the case, and that the defendants have no just cause to complain of any of them.

5. The verdict of the jury fixed the value of the furniture at \$1,500, and awarded the plaintiff damages to the amount of \$500 on account of the taking. Upon entry of judgment the plaintiff remitted the damages, the judgment entered being in the alternative, for the possession of the property, or for \$1,500 in case return could not be had. The defendants insist upon a reversal of the judgment and order because the judgment is not in strict accordance with the verdict. The evidence clearly does not sustain any finding for damages. If the judgment had included the amount so awarded, the district court would doubtless have given the plaintiff the option to remit the erroneous allowance or submit to a new trial, for the defendants would then have been entitled to it; but inasmuch as the same end was accomplished by the voluntary act of the plaintiff, and as the defendants secured all of the relief which they would have been entitled to on the motion, we do not think that the fact that the usual course in such cases was not pursued is a sufficient ground upon which to order a new trial. In any event, the issue as to damages being clearly separable from the other issues in the case, this court, in order to correct a judgment including them, would not have ordered a new trial of the whole case, but of this issue only. (*Collier v. Fitzpatrick*, 19 Mont. 562, 48 Pac. 1103; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506.)

Many other errors are assigned in the brief of appellants,

but we do not think they are of sufficient importance to require special notice. The judgment and order are affirmed.

Affirmed.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

Rehearing denied October 12, 1905.

STATE EX REL. JENKINS, RELATOR, v. DISTRICT
COURT OF SECOND JUDICIAL DISTRICT ET AL.,
RESPONDENTS.

(No. 2,204.)

(Submitted May 22, 1905. Decided July 3, 1905.)

*Certiorari—Change of Venue—Disqualification of Judge—
Notice—Jurisdiction.*

Disqualification of Judge—Affidavit—Notice.

1. Notice of the filing of an affidavit disqualifying a judge, under section 180 of the Code of Civil Procedure, as amended by Act of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, need not be given to the adverse party.

Change of Venue—"Fair Trial Bill"—Calling in Another Judge of Same Court.

2. *Quære:* After an affidavit disqualifying one judge of a court has been filed under the provisions of the "Fair Trial Bill," and a motion for change of venue made, as required by section 615 of the Code of Civil Procedure, as amended, may the disqualified judge call in another judge of the same court to try the cause?

Change of Venue—Disqualification of Judge—Vacation of Order—Jurisdiction.

3. Under Code of Civil Procedure, section 180, as amended by Acts of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, providing that on the disqualification of a district judge by the filing of an affidavit provided for, his authority ceases except to arrange his calendar, invite in another judge, and change the venue if the judge invited fails to come within thirty days, where a judge, on being disqualified, changed the venue to another county, a judge of a different department of the same court had no jurisdiction to hear a motion to annul such order changing the place of trial.

Change of Venue—Notice.

4. Notice of motion for change of place of trial, under section 615 of the Code of Civil Procedure, as amended by Act of Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 8, is not required to be given to the adverse party.

ORIGINAL application for writ of review by the state, on the relation of W. B. Jenkins, against the district court of the second judicial district and Hon. John B. McClernan, judge, to set aside an order changing the place of trial. Order annulled.

Messrs. Maury & HogevoU, for Relator.

Mr. Peter Breen, and Mr. Jeremiah J. Lynch, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

This cause comes before us upon the application of the relator for a writ of review. The petitioner is the plaintiff in a certain suit instituted in the district court of the second judicial district, wherein John J. Quinn and others are the defendants. Two of the defendants, after demurring to the complaint, answered, the answer being filed on the 1st day of December, 1904. Some time in January, 1905, an affidavit dated on the 4th day thereof, disqualifying the Honorable Michael Donlan, judge of department 2 of the court, on the ground of bias and prejudice, under section 180 of the Code of Civil Procedure, as amended at the second extraordinary session of the Eighth Legislative Assembly (Laws 2d Extraordinary Session of 1903, p. 9), was filed; and on the 7th day of January, Judge Donlan, "having decided not to call in another judge, made and entered an order that the said cause be transferred to the district court in and for the county of Beaverhead. Thereafter the attorneys for the defendants, after notice, moved the court to annul and set aside the order which changed the place of trial, giving as the grounds of the motion (1) that no motion was made and filed by the plaintiff or defendants to change the place of trial in said action; (2) that the affidavit of disqualification was insufficient; and (3) that the plaintiff did not give the defendants' attorneys notice of his intention to ask for a change of venue in the said action. On the 18th day

of January, the court, Honorable John B. McClernan presiding, after hearing said motion, ordered that the former order of the court, made by Judge Donlan, changing the place of trial to Beaverhead county, be vacated, and the same was then and there done.

The record in the case, having been certified to this court as by us directed, is now before us. It shows that the order changing the place of trial was made on "motion of counsel for plaintiff." Section 615 of the Code of Civil Procedure, as amended at the extraordinary session above referred to, provides, among other things, that the court or judge must *on motion* change the place of trial for certain reasons; among them appearing, in subdivision 4, disqualification of the judge. The filing of the affidavit provided for in section 180, as amended, disqualifies the judge mentioned in the affidavit. Under section 180, as amended, "a district judge may be disqualified by the filing of an affidavit provided for in subdivision 4 thereof. His authority with reference to the particular matter then ceases, except that he may arrange his calendar, invite in another judge to try the cause for him, or, if he invites another judge, who fails to come within thirty days after a motion for a change of venue is made, he still retains authority to change the place of trial. * * * No hearing is to be had upon the matter. The filing of the affidavit itself works the disqualification, and no purpose whatever could be served by giving notice. When the reason for the rule ceases, so does the rule itself." (*State ex rel. Anaconda Copper M. Co. v. Clancy, Judge, et al.*, 30 Mont. 529, 77 Pac. 312.) We therefore see that there is no reason why any notice should be given to the defendants of the making and filing of this affidavit, and that the district judge is disqualified upon the filing of the affidavit, and cannot do anything further in the premises except as above stated.

It does not appear that Judge McClernan was called in to department 2, where, presumably, under the rules of court adopted under the law for the disposition of business, this case

belonged. The motion to vacate was referred to him in his own department by Judge Donlan. The affidavit which we have in the record contains the allegations necessary under the statute, and nothing more could be done except to change the place of trial. We are inclined to the belief that Judge McClernan could have been called in, in the discretion of Judge Donlan, to try the case, as well as and as properly as if he had been a judge of some other county; but he was not so called to try the case, and there was not any order made *transferring the cause* to the department over which Judge McClernan presides. We are not at this time passing upon the question whether or not such an order might have been made lawfully under the "Fair Trial Bill." The record shows that the motion required by section 615, as amended, for change of place of trial, was made. Therefore the contention that no motion was made by plaintiff for such change cannot be sustained.

Defendants also complain, as above stated, that there was not any notice of the motion for the change given to them. The law does not require any notice of such a motion. Our statute (section 834 of the Code of Civil Procedure) provides: "After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given." This, of course, should go without saying, for it amounts to saying that a man ought to have what he is entitled to, and that a thing must be done which must be done. Section 1822 of the same Code states that, "when a written notice of a motion is necessary, it must be given five days before the appointed time for the hearing, if both parties reside in the county where the court is held, otherwise, ten days." But, reading section 615, we do not find that any notice for change of place of the trial is required to be given at all, and we cannot find any provision in our Code requiring notice of such motion to be given. The judge must change the place of trial upon the filing of the affidavit of disqualification, unless he, in his discretion, shall call in another judge, and even then if such judge do not appear within thirty days.

Under the facts above stated, it seems to us that Judge McClernan was acting entirely beyond his jurisdiction in vacating the order changing the place of trial, just as much as judge Donlan would have been doing if he had vacated the order, and therefore his action in making such order should be, and is hereby, annulled and set aside.

Order annulled.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, having been absent when this matter was submitted, does not take part herein.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED
IN THIS VOLUME.

No. 2,121.—ALEXANDER MACKEL, APPELLANT, v. THE
NORTHERN PACIFIC RAILWAY COMPANY, RE-
SPONDENT.

*Appeal from District Court, Silver Bow County; E. W.
Harney, Judge.*

On motion to dismiss appeal.

Decided January 31, 1905.

PER CURIAM.—Upon motion of the appellant this appeal is
hereby dismissed without costs to either party.

Messrs. Mackel & Meyer, for Appellant.

No. 2,165.—F. FREEMAN, APPELLANT, v. KARL EDEL-
MUTH, RESPONDENT.

*Appeal from District Court, Carbon County; Frank Henry,
Judge.*

On motion to dismiss appeal.

Decided February 15, 1905.

PER CURIAM.—The motion to dismiss the appeal herein is hereby sustained and the appeal dismissed; and it is further ordered that the order of *supersedeas* heretofore issued herein be and the same is hereby vacated and set aside.

Mr. Albert I. Loeb, for Appellant.

Mr. George W. Pierson, and *Messrs. Wallace and Donnelly*,
for Respondent.

No. 2,123.—IN THE MATTER OF THE ESTATE OF ALBERT G. CLARKE, DECEASED. LEROY A. GODDARD, APPELLANT.

Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.

On motion to dismiss appeal.

Decided February 15, 1905.

PER CURIAM.—The motion to dismiss the appeal herein is hereby sustained and the appeal dismissed.

Messrs. Carpenter, Day & Carpenter, for Appellant.

Messrs. Walsh & Newman, for Respondent.

No. 2,170.—THE STATE OF MONTANA EX REL. B. E. CALKINS, RELATOR, v. SECOND JUDICIAL DISTRICT COURT AND HONORABLE MICHAEL DONLAN, A JUDGE THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided February 16, 1905.

PER CURIAM.—Relator's application for a writ of supervisory control herein is hereby denied.

Messrs. Davies & Haskins, for Relator.

No. 2,174.—IN THE MATTER OF THE APPLICATION OF CHRISTINE NISSLER, AND OTHER HEIRS OF CHRISTINE NISSLER, DECEASED, FOR A WRIT OF PROHIBITION.

Original application to prohibit Hon. Michael Donlan, a judge of the district court of Silver Bow county, from hearing and considering certain matters.

Decided February 23, 1905.

PER CURIAM.—Relator's application for a writ of prohibition herein is hereby denied.

Mr. M. J. Cavanaugh, for Relator.

No. 2,092.—GALLATIN LIGHT, POWER AND RAILWAY COMPANY, APPELLANT, v. CITY OF BOZEMAN ET AL., RESPONDENTS.

Appeal from District Court, Gallatin County; W. B. C. Stewart, Judge.

On motion to dismiss appeal.

Decided March 24, 1905.

PER CURIAM.—Upon motion of counsel for respective parties, this cause is hereby dismissed as settled.

Messrs. Hartman & Hartman, for Appellant.

Mr. John A. Luce, for Respondents.

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No. 2,183.—W. T. PERHAM, APPELLANT, v. H. J. SMITH
ET AL., RESPONDENTS.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

On motion to dismiss appeal from judgment.

Decided April 17, 1905.

PER CURIAM.—Respondent's motion to dismiss the appeal from the judgment herein is sustained, and the appeal from the judgment hereby dismissed.

Messrs. McBride & McBride, and *Mr. J. Bruce Kremer*, for Appellant.

Mr. Robert B. Smith, for Respondents.

Nos. 2,138 and 2,139.—THE STATE OF MONTANA EX
REL. MICHAEL DONLAN, RELATOR, v. THE SEC-
OND JUDICIAL DISTRICT COURT, IN AND FOR
THE COUNTY OF SILVER BOW ET AL., RESPOND-
ENTS.

Mr. Geo. F. Shelton, *Mr. Bernard Noon*, and *Mr. C. F. Kelley*, for Relator.

Mr. T. J. Walsh, for Respondents.

No. 2,140.—THE STATE OF MONTANA *EX REL.* CHARLES P. NEVIN, RELATOR, *v.* THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF SILVER BOW *ET AL.*, RESPONDENTS.

Mr. J. Bruce Kremer, for Relator.

Mr. T. J. Walsh, for Respondents.

No. 2,141.—THE STATE OF MONTANA *EX REL.* WM. B. DALY, RELATOR, *v.* THE SECOND JUDICIAL DISTRICT COURT IN AND FOR SILVER BOW COUNTY *ET AL.*, RESPONDENTS.

Mr. J. Bruce Kremer, for Relator.

Mr. T. J. Walsh, for Respondents.

Original applications for writs of prohibition.

Argued and submitted upon demurrers December 24, 1904.
Demurrers overruled.

Decided April 20, 1905.

PER CURIAM.—The foregoing causes are hereby dismissed for want of prosecution.

No. 2,197.—IN THE MATTER OF THE APPLICATION OF S. C. HERRON FOR WRIT OF MANDATE.

Original application for writ of mandate directed to John W. Tattan, judge of the district court of Valley county, commanding said judge to enter petitioner Herron's name as counsel for one Malcolm charged with the crime of murder.

Decided April 24, 1905.

PER CURIAM.—The relator's petition for a writ of mandate herein, set for hearing this day, was, after the introduction of testimony by the relator, argued by counsel for the respective parties, and upon due consideration, the said application is denied and the proceedings are hereby dismissed.

Messrs. Walsh & Newman, and Mr. Henry N. Blake, for Relator.

A. J. Galen, Attorney General, for Respondent.

No. 2,203.—STATE OF MONTANA **EX REL.** MARY HARRINGTON, **RELATOR**, *v.* THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND HONORABLE J. B. McCLERNAN, A JUDGE THEREOF, **RESPONDENTS**.

Original application for writ of prohibition to restrain respondents from proceeding further in a cause entitled *Calkins v. Harrington*, pending in the district court of Silver Bow county.

Decided May 1, 1905.

PER CURIAM.—Relator's application for a writ of prohibition is hereby denied.

Messrs. Maury & HogevoU, for Relator.

No. 2,205.—THE STATE OF MONTANA EX REL. A. C. BAUM, RELATOR, v. SECOND JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA, AND THE HONORABLE J. B. McCLERNAN, A JUDGE THEREOF, RESPONDENTS.

Original application for writ of review.

Decided May 1, 1905.

PER CURIAM.—Relator's application for a writ of review is hereby denied.

Messrs. Maury & HogevoU, for Relator.

FLORENCE E. KEHOE, AN INFANT, BY LYDIA FROST, HER GUARDIAN AT LITEM, APPELLANT, v. D. H. KEHOE ET AL., RESPONDENTS.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Decided May, 5, 1905.

PER CURIAM.—The appellant and respondents having failed to file their briefs herein, it is now here ordered and adjudged that the order of the court below made and entered on the 25th day of May, 1904, be and the same is hereby affirmed at the cost of appellant.

Mr. C. M. Parr, for Appellant.

No. 2,212.—THE STATE OF MONTANA EX REL. MERI STRUTCEL, AS EXECUTOR, RELATOR, v. THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND THE HONORABLE GEORGE M. BOURQUIN AND THE HONORABLE JOHN B. McCLERNAN, JUDGES THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided June 6, 1905.

PER CURIAM.—The relator's petition for writ of supervisory control herein is hereby denied.

Mr. John Lindsay, and Mr. James H. Baldwin, for Relator.

No. 2,148.—THE STATE OF MONTANA, RESPONDENT, v. JOHN ELSNER, APPELLANT.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

On motion to dismiss appeal for failure to file brief.

Decided June 14, 1905.

PER CURIAM.—The respondent's motion to dismiss the appeal herein is granted, and the appeal is hereby dismissed.

Mr. A. J. Galen, Attorney General, for Respondent.

No. 1,745.—D. L. S. BARKER, ADMINISTRATOR, APPELLANT,
v. MARCELLA S. BARKER, RESPONDENT.

*Appeal from District Court, Cascade County; J. B. Leslie,
Judge.*

On motion to dismiss appeal.

Decided June 12, 1905.

PER CURIAM.—Upon motion of appellant this appeal is by
the court dismissed.

*Mr. Fletcher Maddox, and Mr. H. G. McIntire, for Appel-
lant.*

Mr. T. E. Brady, and Mr. Wm. G. Downing, for Respondent.

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ABANDONMENT.

See, also, Landlord and Tenant, 1.

Water Rights—Intent.

1. Abandonment is a matter of intention, and consists in the giving up of a thing absolutely without reference to any particular person or purpose.—Norman v. Corbley, 195.

Water Rights—Joint Notice of Appropriation.

2. A joint notice, filed by successive appropriators of water, stating that they have a claim and right to use a given quantity of water on certain described lands, and that they appropriated the water as to one ditch in one year and as to another ditch in another year, does not of itself constitute or show an abandonment of prior appropriations, and the initiation of a new right and appropriation.—Norman v. Corbley, 195.

ABATEMENT.

Mandamus—Dismissed as Abated—When.

1. Where a *mandamus* proceeding has abated because of the expiration of the terms of office of the officials against whom it is directed, it will be dismissed, although the question of abatement has not been raised by counsel on either side.—State ex rel. Stranahan v. Board of State Canvassers, 13.

ACCOUNTING.

Complaint—Sufficiency.

1. A complaint containing no allegation of a demand for a general accounting and a refusal by defendant, states no cause of action for an accounting.—Ayotte v. Nadeau, 498.

ACCOUNTS.

See, also, Receivers, 8.

Receivers—Wrongful Appointment—Evidence—Damages.

1. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, plaintiff may show as an item of damage the amount of a good and collectible account which was lost by reason of the receivership.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Receivers—Wrongful Appointment—Evidence.

2. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, evidence of the loss of an account through the receivership and the statute of limitations, is admissible, although no trial of the question in the courts had been had.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Presumptions.

3. Under Code of Civil Procedure, section 3266, subsection 32, providing that it is presumed that a thing once proved to exist continues to exist as long as is usual with things of that nature, accounts which are shown to have once been good and collectible are presumed to so continue.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

ACCOUNTS STATED.**Agreements—Past Transactions—Conclusive Between Parties.**

1. An instrument which is the result of an agreement relating to past transactions, acknowledging an indebtedness and promising to pay it, is, in effect, an account stated, on which an action may be based, and, in the absence of fraud, error or mistake in its execution, specifically alleged in the answer is conclusive between the parties.—*Noyes v. Young et al.*, 226.

ACKNOWLEDGMENTS.**Mortgages—Certificate—Sufficiency—Notice—Clerical Error.**

1. Under Civil Code, sections 1640, 1641, providing for the recording of deeds, and making them constructive notice to subsequent purchasers, and section 4667, declaring that every person who has actual notice sufficient to put him on inquiry has constructive notice of the fact itself, if by inquiry he might have learned such fact, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that, in the statement that the parties "severally acknowledged — he — executed the same," the blanks before and after the word "he" were not filled so as to make the word "they."—*Trerise v. Bottego et al.*, 244.

ACTIONS.**Dismissal Without Prejudice—When too Late.**

1. Where a motion for judgment on the pleadings has been made by defendant, under the provisions of Code of Civil Procedure, section 722, as amended by Session Laws of 1899, page 142, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within Code of Civil Procedure, section 1004, subdivision 1.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal Without Prejudice—Not Final Judgment—Minutes—Appeal.

2. The mere entry in the minutes of the court of an order, under Code of Civil Procedure, section 1004, that an action "is dismissed without prejudice, as *per praeceptum* filed" by plaintiff, is not a final judgment from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could not have entered.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal—Mandamus—Reinstatement of Cause.

3. *Held*, that where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the action without prejudice on plaintiff's motion, *mandamus* will lie to require the court to reinstate the cause, and determine defendant's motion, as an appeal from a judgment of dismissal, if available, would be inadequate in that it would not present for the determination of the appellate court the question as to whether or not the district court should pass upon the motion for judgment on the pleadings.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Assignability—Fire Insurance—Damages—Right to Recover—Interest.

4. The right to recover damages for the negligent destruction of property by fire, together with interest recoverable in the discretion of the jury under Civil Code, section 4281, is assignable under Civil Code, section 1351, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed.—*Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 46.

Wrongful Procurement of Receiver—Executors—Survival of Action.

5. Under Code of Civil Procedure, section 2733, a cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of the decedent wrongdoer.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

What is Included in "Action."

6. The words "action" and "proceeding" include all intermediate steps to be taken in an action or proceeding.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

In Name of City—Police Regulations—Infractions not Crimes.

7. Infractions of local police regulations, such as noncompliance with an ordinance making it the duty of an occupant of premises within city limits to keep them free from snow, ice, etc., are not, in their essence, crimes or misdemeanors, and actions arising out of them are properly prosecuted in the name of the city.—*City of Helena v. Kent*, 279.

Against Government—Public Lands.

8. One may not have his right to public land, as against the government, determined by the courts in an action against the government.—*Butte Land & Inv. Co. et al. v. Merriman et al.*, 402.

Character—How Determined.

9. The character of an action—whether one at law or in equity—must be determined by the kind of relief which the pleadings of a party entitle him to.—*Ayotte v. Nadeau*, 498.

ADMINISTRATORS.

See, also, Executors.

Distribution—Appeal—Jurisdiction—Dismissal.

1. Where the distributees of a decedent's estate executed receipts for their respective shares under the decree of distribution, which was thereupon satisfied and the administrator discharged, the receipts reciting that they were not intended to cover any money or property referred to in the decree not yet discovered, thus implying that this exception was the only reservation made by the distributees as to the liability of the administrator, and thereafter appeal from such decree, the supreme court will dismiss such appeal for lack of jurisdiction.—*In re Black's Estate*, 51.

Allegation of Official Capacity—When Unnecessary.

2. Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is required.—*Noyes v. Young et al.*, 226.

ADVERSE CLAIMS.**Mines—Government not Party—Effect of Judgment.**

1. Under Revised Statutes of the United States, section 2326, the government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contend-

ing claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered.—Butte Land & Inv. Co. et al. v. Merriman et al., 402.

ADVERSE USER.

See Waters and Water Rights, 15, 17; Real Estate, 6.

AFFIDAVITS.

Mandamus—Contents—Inference—Speculation.

1. The affidavit on which an application for *mandamus* is based must set forth clearly and succinctly the facts furnishing the foundation for the relief sought, leaving nothing to inference or speculation.—State ex rel. Breen v. Toole, Governor, 4.

Fair Trial—Judges—Disqualification—When to be Filed.

2. Under Code of Civil Procedure, section 180, as amended by Laws of 1903 (Second Extra. Session, page 9), providing that no judge shall act in any civil action or proceeding in which an affidavit of disqualification has been filed at any time before the day fixed for the trial or hearing, such affidavit is not effective to interrupt a hearing after the day fixed for it, no matter whether it be a final hearing or trial, or merely a step taken in the case involving a decision of some controverted matter.—State ex rel. Nissler et al. v. Donlan et al., 256.

Prohibition—Judges—Disqualification—Fair Trial.

3. Prohibition does not lie to stay a district judge from proceeding further in the hearing of a motion made in a probate proceeding, where an affidavit of disqualification was not filed before the day fixed for the hearing of such motion. (Laws of 1903, Second Extra. Session, p. 9.)—State ex rel. Nissler et al. v. Donlan et al., 256.

Good Faith—Chattel Mortgages.

4. A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors, where it is not accompanied by the affidavit of the mortgagee, required by Civil Code, section 3861, that the same is made in good faith and without design to hinder, delay or defraud creditors.—First Nat. Bank of Butte v. Beley et al., 291.

Chattel Mortgages—Proper Affidavit of Renewal will not Validate Void Mortgage.

5. An affidavit of renewal of a chattel mortgage, filed under Civil Code, section 3866, stating the necessary facts, does not validate a mortgage which was originally void as to attaching creditors because of the absence of the affidavit of good faith required by section 3861 of the same Code, although such mortgage is good and valid between the parties to it.—First Nat. Bank of Butte v. Beley et al., 291.

Receivers—Complaint—Verification.

6. An *ex parte* order appointing a receiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information and belief" is insufficient.—Benepe-Owenhouse Co. v. Scheidegger, 424.

Disqualification of Judge—Notice.

7. Notice of the filing of an affidavit disqualifying a judge, under section 180 of the Code of Civil Procedure, as amended by Act of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, need not be given to the adverse party.—State ex rel. Jenkins v. District Court et al., 595.

AGENCY.

Water Rights—Pleadings—Unauthorized Representations—Estoppel.

1. Where, in a suit to restrain interference with the flow of flood waters in certain ditches, it is not alleged that a codefendant, who *professed* to be authorized to sell the land, was the agent of the owner or empowered to make any representations for him, and the other defendants are not connected with his statements, they are not estopped to deny plaintiff's right to transmit waters through the ditches by representations of such codefendant, made before plaintiff's purchase, that the waters were carried through the ditches.—*Campbell v. Flannery et al.*, 119.

Life Insurance—Acts of Agent—Liability of Insurer.

2. *Obiter*: Where, by the terms of a life insurance policy, the statements contained in the application are made a part of it as conditions precedent, and the assurer assumes the risk only on the faith that they are true, the latter does not become liable where the agent or solicitor knows that the representations made are not true, when under the terms of the contract he has no authority to waive any requirement in this regard made by the principal.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Insurance—Acts of Agent—Ratification—Presumptions.

3. Under a contract of insurance which provided that none of its conditions could be varied or modified by an agent except by agreement in writing signed by an officer of the insurance company, the assured is presumed to know that any engagements he may enter into with the agent are not binding upon the company unless brought home to and ratified by it.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Insurance—Misrepresentations—Ratification.

4. A misrepresentation by the local agent of an insurance company to it as to the date of payment of a premium, prevented any ratification of the agent's act in receiving it and any waiver by the company.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Mortgage—Interest—Collection.

5. The mere fact that a person acted as the agent of the owner of a mortgage in collecting interest and delivering the canceled coupons, is not sufficient to show authority to collect the principal and discharge the mortgage.—*Cornish v. Woolverton et al.*, 456.

Mortgage—Collection Agent—Duty to Ascertain Authority.

6. One paying a debt secured by mortgage to a supposed agent of the owner of the mortgage is bound to ascertain the scope of the agent's authority, otherwise he assumes the risk incident to such failure to make inquiry.—*Cornish v. Woolverton et al.*, 456.

ALIMONY.

See Divorce, 1.

APPEAL.

Judgment—Amendment After Entry—Appealable Order.

1. An order amending a judgment already entered is a special order after final judgment, and therefore appealable under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Session Laws 1899, p. 146).—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Judgment—Affirmance—District Courts—Reopening Case.

2. When, upon appeal to the supreme court, a judgment of the district court has been reviewed and affirmed, or a specific judgment

ordered to be entered in the case, it becomes final, and the district court cannot then proceed to reopen the case and allow new issues to be framed to try rights already settled, or amend or modify the judgment of the supreme court so as to enlarge or narrow its scope.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Order Taxing Costs—*Certiorari*—When Proper Remedy.

3. Code of Civil Procedure, as amended by Session Laws of 1899, page 146, authorizes an appeal from a special order after final judgment. After an affirmance of a judgment on appeal the trial court made an order allowing certain costs that had not been previously allowed; the order, however, did not amend the judgment. *Held*, that *certiorari* was the proper remedy to review the order so made, it being merely an order taxing costs, not appealable, and no appeal being permissible from the judgment for the purpose of reviewing the order, since it was not included in the judgment already reviewed on appeal.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

District Courts—Order Taxing Costs—Omission of Items—Inadvertence.

4. Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him, which judgment had been affirmed on appeal by defendant, the trial court had no authority, after affirmance, to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court, since the Code of Civil Procedure, section 774, providing that the court may relieve a party from an order made through his mistake, inadvertence or excusable neglect, applies only to the mistake, inadvertence, surprise or excusable neglect of the party litigant and not of the court.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Dismissal Without Prejudice—Not Final Judgment—Minutes.

5. The mere entry in the minutes of the court of an order, under Code of Civil Procedure, section 1004, that an action "is dismissed without prejudice, as *per praecepe* filed" by plaintiff, is not a final judgment from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could have been entered.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal of Action—*Mandamus*—Reinstatement of Cause.

6. *Held*, that where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the action without prejudice on plaintiff's motion, *mandamus* will lie to require the court to reinstate the cause, and determine defendant's motion, as an appeal from a judgment of dismissal, if available, would be inadequate in that it would not present for the determination of the appellate court the question as to whether or not the district court should pass upon the motion for judgment on the pleadings.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Remedy—Plain, Speedy and Adequate—*Mandamus*.

7. If the remedy by appeal, or any other method than *mandamus*, is not plain, speedy and adequate, *mandamus* will lie, the case otherwise being a proper one.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Judgment—Satisfaction—Review.

8. When a judgment has been paid, it ceases to be reviewable on appeal.—*In re Black's Estate*, 51.

Administrators—Distribution—Jurisdiction—Dismissal.

9. Where the distributees of a decedent's estate executed receipts for their respective shares under the decree of distribution, which was

thereupon satisfied and the administrator discharged, the receipts reciting that they were not intended to cover any money or property referred to in the decree not yet discovered, thus implying that this exception was the only reservation made by the distributees as to the liability of the administrator, and thereafter appeal from such decree, the supreme court will dismiss such appeal for lack of jurisdiction.—*In re Black's Estate*, 51.

Nonsuit—Presumptions.

10. On appeal from a judgment sustaining defendant's motion for a nonsuit made at the close of plaintiff's evidence, every fact which the evidence tends to prove will be deemed proved.—*Allen v. Bell*, 69.

Evidence—Objections—Supreme Court.

11. An objection to the admission of evidence raised for the first time in the supreme court will not be considered.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Evidence—Corporations—Books.

12. Where the books and papers of a corporation were admitted in evidence without objection, it cannot be claimed on appeal that the admission of one of such papers constituted error.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Offer of Proof—Rejection.

13. The rejection of an offer of proof will not be reviewed on appeal where the party making the offer did not state and have placed on the record what he intended to prove.—*Thornton-Thomas Merc. Co. v. Bretherton, et al.*, 80.

Pleadings—Jurisdiction—Supreme Court.

14. Under Code of Civil Procedure, section 685, providing that objections, except only the objection to jurisdiction of the court, are waived if not taken by demurrer or answer, the question of jurisdiction may be raised for the first time in the supreme court.—*Oppenheimer v. Regan*, 110.

Justices of the Peace—Jurisdiction—District Courts.

15. Where a justice of the peace had no jurisdiction of the subject matter of an action, the district court could acquire none by appeal.—*Oppenheimer v. Regan*, 110.

Judgment—Verdict—Evidence.

16. Whether a verdict is supported by any substantial evidence, being a question of law, may be determined on appeal from the judgment.—*Carman v. Mont. C. Ry. Co.*, 137.

Implied Findings—Request—Exceptions.

17. Under the doctrine of implied findings, a judgment will not be reversed for want of findings, unless the party aggrieved shall have requested them in writing, caused such request to be entered in the minutes of the court, and made and saved exceptions to the action of the court, in accordance with the requirements of section 1114 of the Code of Civil Procedure.—*Bordeaux v. Bordeaux*, 159.

Supplemental Transcript—Certificate—Findings.

18. A supplemental transcript containing findings rejected by the trial court, which formed no part of the judgment-roll, or of the statement on motion for new trial, or of any bill of exceptions settled by the court, authenticated only by a certificate of the clerk, will be disregarded on appeal.—*Bordeaux v. Bordeaux*, 159.

Nonappealable Orders—Justices of the Peace.

19. An order of the district court, overruling a motion to dismiss an appeal to that court, from a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be

appealable under Code of Civil Procedure, section 1722, as amended by the Act of 1899. (Session Laws of 1899, p. 146.)—*Raymond v. Raymond et al.*, 170.

Nonappealable Orders—Reviewed—How.

20. If a particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment.—*Raymond v. Raymond et al.*, 170.

From Justice's Court—Dismissal—Nonappealable Order.

21. An order sustaining a motion to dismiss an appeal from a justice's court is not appealable. (Session Laws of 1899, p. 146.)—*Franzman v. Davies et al.*, 251.

From Justice's Court—Failure to Demand Judgment—Dismissal of Case.

22. Where more than six months had elapsed after an order made sustaining a motion to dismiss an appeal from a justice's court, and respondent had neglected to demand and have entered a judgment in accordance with such ruling, as required by Code of Civil Procedure, section 1004, subdivision 6, it was error to deny a motion to dismiss the case and to render judgment dismissing the appeal.—*Franzman v. Davies et al.*, 251.

Briefs—Points Relied upon—Failure to State—Affirmance.

23. Where the brief of the appellant fails to show on what he relies for a reversal of the judgment, and the applicability of the propositions discussed in the brief cannot be determined without an independent investigation by the supreme court, the case stands as if no brief had been filed, and the judgment will be affirmed.—*McIntosh Hde. Co. v. Flathead County*, 254.

New Trial—Statutes.

24. An appeal from an order denying a new trial will not be considered if not taken within the time allowed by statute.—*Lynch v. Herrig*, 267.

New Trial—Statement—When Considered on Appeal from Judgment.

25. The statement on motion for a new trial, as settled and in the record, may be considered, on appeal from the judgment, as to all errors of law therein specified, though an appeal from the order denying the motion for a new trial was not taken in the time allowed.—*Lynch v. Herrig*, 267.

New Trial—When Order Granting it will be Affirmed.

26. Where an order granting a new trial is general, it will be affirmed if either of the grounds assigned in support thereof is sufficient.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

New Trial—Specifications—Headings.

27. While, in a statement on motion for new trial, specifications of error should be arranged separately under appropriate headings so as to avoid confusion and lessen the labor of re-examination in the trial and appellate courts, still such headings, or any headings, are not absolutely necessary to entitle the moving party to a hearing.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Action for Injuries—New Trial—Specifications.

28. All the errors specified in a statement on a motion for a new trial, in an action to recover damages for personal injuries, were under the heading, "Specifications of Errors Occurring at Said Trial." The first specification was that there was no evidence that the defendant, or any officer thereof, failed to provide suitable appliances, or provided unsafe apparatus, so as to cause the injury alleged in the complaint, nor was there any evidence that a certain witness was other

than plaintiff's fellow-servant, etc. Then followed three other assignments questioning the sufficiency of the evidence, followed by others directed at the instructions. *Held*, that the first four specifications of error were not fatally defective, in that they were designated by the title as errors occurring at the trial, while in fact they were assignments of particulars wherein the evidence was insufficient to sustain a finding, as provided by Code of Civil Procedure, section 1173.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Action for Injuries—New Trial—Statement.

29. Where, in an action for injuries to a servant, the principal controversy was whether defendant was guilty of any negligence in providing suitable appliances, and its liability rested on the question whether A was a fellow-servant or was acting for the defendant as a vice-principal, a specification of error in the statement for new trial that there was no evidence that A was an officer of defendant, that he stood in any other relation than that of fellow-servant to plaintiff, or that defendant was in any wise bound by his conduct in making an alleged change of a rope and snatch-block attached to the hoisting apparatus, the breaking of which caused the injury, sufficiently pointed out wherein the evidence was insufficient, as required by Code of Civil Procedure, section 1173.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Request for Additional Instructions.

30. Where the instructions of the court fairly cover the case, and are correct, the judgment will not be reversed because all the phases of the case are not covered by them, where no additional instructions covering the particular point are requested.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Rehearing—Petition—When Proper to be Presented—When not.

31. A petition for rehearing should be presented only in those cases where reasonably good grounds therefor exist, and this should appear on the face of the petition. The court should not be asked to reconsider matters which have been considered and determined, especially where its view is conceded by counsel to be supported by authority.—*Collins v. Metropolitan Life Ins. Co.*, 346.

Former Appeal—Law of the Case.

32. The decision of the supreme court on questions directly involved and considered on a former appeal is the law of the case on a second appeal.—*Finlen v. Heinze et al.*, 354.

Amendment—Surprise—Variance—Former Appeal.

33. Plaintiff cannot claim to have been surprised by the amendment of the counterclaim to conform to the proof, which defendant was permitted to make after conclusion of his direct testimony, where the same variance existed on a former trial and was called to the attention of the parties in the opinion on appeal from the decree then rendered.—*Finlen v. Heinze et al.*, 354.

Receivers—Appointment—Exigency—Burden of Proof—Record.

34. Under Code of Civil Procedure, section 951, authorizing the *ex parte* appointment of a receiver only when there is immediate danger of the removal, loss, or destruction of the property or fund, the burden is on the applicant to show that such an exigency exists as to authorize the appointment *ex parte* and when the case is brought before a court of review, such showing must affirmatively appear from the record.—*Benepe-Owenhouse Co. v. Scheidegger*, 424.

Jurors—Witnesses—Credibility—Evidence.

35. The jurors are the judges of the credibility of witnesses and of the weight to be given the testimony, and the supreme court, on appeal from judgment of conviction for the crime of rape, may not weigh

the evidence and say that it does not prove that which it tends to prove, or that particular evidence does prove particular facts.—*State v. Jones*, 442.

Failure to File Briefs.—Result.

36. Where both parties failed to file briefs in the Supreme court on an appeal from an order of the district court, the order was affirmed at the cost of appellant.—*Kehoe v. Kehoe et al.*, 606.

Failure to File Briefs—Rules—Supreme Court.

37. Supreme Court Rule X, subdivision 5 (30 Mont. xxix), which provides that where an appellant is in default in filing his brief the case may be dismissed on motion, will not be relaxed where counsel was not prevented from observing it by press of other professional duties or interruptions caused by illness or the like.—*State v. Franceschi*, 495.

Record—Alteration Without Order of Court—Dismissal.

38. Where counsel for appellant was allowed by the clerk of the supreme court to take the record from his office, and thereafter the record was rearranged in certain particulars, and changes made by incorporating in it a certificate of the trial judge settling the bill of exceptions and the notice of appeal, and by adding an entirely new certificate of the clerk of the district court, bearing date a month later than the supreme court file-marks, the appeal will be dismissed, though counsel, after notice of motion to dismiss, filed a suggestion of diminution of the record and asked for an order directing the clerk of the district court to correct the defects and supply the omissions, theretofore attempted to be done without such order.—*State v. Franceschi*, 495.

Rulings Prior to Trial—How Reviewed.

39. Rulings of the trial court made prior to trial are reviewable on appeal from the judgment.—*Ayotte v. Nadeau*, 498.

Pleadings—Sufficiency—Question for Review.

40. Where, at the outset of the trial, the sufficiency of a pleading is challenged by objection to the introduction of evidence by the opposing party, on the ground of want of substantial allegations therein, the question thus presented is reviewable on appeal from an order denying a new trial.—*Ayotte v. Nadeau*, 498.

Theory of Case—Instructions.

41. Where a cause was tried in the district court as one at law, a general verdict had and a judgment entered for plaintiff, he, on defendant's appeal, cannot change his ground in the supreme court and insist that the cause was one in equity, and that therefore error in giving or refusing instructions is not ground for reversal.—*Ayotte v. Nadeau*, 498.

Verdict—Harmless Error.

42. Where the evidence would have supported a verdict for a greater amount than that returned in favor of plaintiff, defendants were not entitled to object that the exact amount awarded was not justified by the evidence.—*Brazell v. Cohn et al.*, 556.

Claim and Delivery—Presumptions.

43. On appeal from a judgment in claim and delivery for cattle converted by defendant, the court must presume, in the absence of the evidence, that such evidence supported the verdict, which found that plaintiff was the owner of only part of the cattle claimed, and placed a value upon the part, averaging more per head than the sum claimed for all averaged per head.—*McGregor v. Lang*, 568.

Separable Issues—New Trial.

44. Where an issue as to damages is clearly separable from the other issues in a case, the supreme court, in order to correct a judgment including them, will order a new trial of such issue only.—*Osmers v. Furey et al.*, 581.

APPEALABLE ORDERS.

See Orders.

APPRAISERS, BOARD OF.

See Counties, 3.

APPURTENANCES.

See Waters and Water Rights, 11, 12.

ASSESSMENT.

See Taxation.

ASSESSORS.

See Counties, 3.

ASSIGNABILITY OF CAUSES OF ACTION.

See Actions, 4.

ASSIGNMENT.

See, also, Bills and Notes, 3, 4, 6.

Mortgage—A Nullity—When.

1. The assignment of a mortgage, independent of the debt, is a nullity.—*Cornish v. Woolverton et al.*, 456.

Mortgage—Record—Notice.

2. Under Civil Code, sections 1640 and 3823, the record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured.—*Cornish v. Woolverton, et al.*, 456.

Mortgage—Record—Estoppel.

3. Where an assignee of a mortgage recorded the assignment, and a purchaser of the mortgaged premises afterward paid the debt to the assignor, failure of the assignee to make claim to the ownership of the mortgage until two years after the assignment, and after the assignor had become insolvent, was not sufficient to estop the assignee from enforcing the security, nothing appearing to show that he failed to speak when he should, or that he actively or passively misled the defendants to their prejudice.—*Cornish v. Woolverton et al.*, 456.

ATTORNEYS.**Receivers—Contract of Employment—District Courts.**

1. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding upon the court, as it is its function to determine both the necessity for counsel and the compensation to be allowed therefor.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Fees—Receivers—Liability.

2. After an order appointing a receiver had been reversed on appeal, and more than a year after the termination of the receivership, the receiver and the defendant, without the consent of the party who had procured the appointment of the receiver, stipulated that the defendant's objections to the receiver's reports should be referred. *Held*, that the party who procured the appointment of the receiver was not liable for the fees of the attorneys representing the receiver on the reference.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Receivers—Reversal of Order—Compensation—Fees—Liability.

3. A receiver is not entitled to compensation or allowance for attorneys' fees for any new business transacted after the filing of the *remittitur* reversing the order of his appointment, the expense of the receivership having then terminated, so far as the same could be charged against the trust fund or the person who wrongfully caused the receiver's appointment.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Receivers—Fees—How Fixed—Evidence—Presumptions.

4. Where the court has personal knowledge of the services rendered by attorneys for a receiver, it is not always necessary that it should hear evidence as to the amount which it should allow for attorneys' fees, as the court is presumed to know the value of attorneys' services, but such evidence may be admitted to inform the court what is just and reasonable under the circumstances.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Divorce—Suit Money—Fees—Denial—Harmless Error.

5. Defendant in an action for divorce moved, before trial, for suit money and counsel fees; the application, however, was heard during its progress. No request for continuance was made on any ground. It appeared that she had spent about \$1,000 in preparing the case, and that she owed \$900 of this sum. She was represented by eminent counsel during the entire trial, and the record failed to show that she did not have all the witnesses she desired or all the information concerning plaintiff's witnesses necessary to conduct her defense successfully. *Held*, that under such circumstances, a denial of attorneys' fees and a refusal to allow more than \$200 suit money was not prejudicial error, if error at all.—*Bordeaux v. Bordeaux*, 159.

ATTORNEY GENERAL.**Attorney of Record—Transcript—Briefs—Service.**

1. The attorney general is by law (Political Code, section 460), the attorney of record in all causes pending in the supreme court to which a county may be a party, and as such he is entitled to be served with a copy of the transcript and brief.—*McIntosh Hde. Co. v. Flathead County*, 254.

Actions Against Counties—Transcript—Briefs—Service—Dismissal.

2. An appeal by plaintiff in an action against a county may be dismissed for failure to serve the attorney general with a copy of the transcript and appellant's brief, and such dismissal, unless done without prejudice, will be in effect an affirmance of the judgment. (Code of Civil Proc., sec. 1741)—*McIntosh Hde. Co. v. Flathead County*, 254.

BIAS AND PREJUDICE.

See District Courts, 13, 14, 16, 18, 27, 28, 29, 30; Jury, 6.

BILLS AND NOTES.

When Non-negotiable.

1. A note providing that if not paid when due, both principal and interest coupons shall bear an increased rate of interest, is non-negotiable.—*Cornish v. Woolverton et al.*, 456.

Notes Secured by Mortgage—When Non-negotiable.

2. Where a note is secured by a mortgage of even date with the note, and the mortgage provided that the mortgagor should pay the taxes and insurance, keep the property in repair, commit no waste, etc., and that in default of performance of any covenant the principal and interest should become due, and the mortgage be subject to foreclosure, at the option of the mortgagee, and that, if foreclosure proceedings were commenced, \$150 should be allowed as an attorney's fee, the note and mortgage are *held* to be parts of the same contract, under Civil Code, section 2207, which must be read and construed together, thus rendering the fulfillment of the entire contract uncertain and the note therefore non-negotiable.—*Cornish v. Woolverton et al.*, 456.

Mortgages—Assignment.

3. A mortgage given to secure the payment of a note is but an incident, and passes to the assignee of the note.—*Cornish v. Woolverton et al.*, 456.

Negotiable Instruments—Transfer Without Indorsement—Effect.

4. A transfer of a negotiable instrument, payable to order, without indorsement, destroys its negotiable character, and the assignee takes it subject to all defenses available against it in the hands of the payee.—*Cornish v. Woolverton et al.*, 456.

Note Secured by Mortgage—Negotiability.

5. *Quære*: Is a note, though negotiable in form, non-negotiable when secured by a mortgage, without regard to whether it contains any reference to the mortgage or any conditions contained therein?—*Cornish v. Woolverton et al.*, 456.

Non-negotiable Contracts—Assignment—Notice—Payment to Assignor.

6. Under Code of Civil Procedure, section 571, where the maker of a non-negotiable contract made for the payment of money or personal property, pays the assignor the debt or obligation without notice of an assignment of such contract, and in good faith, and takes an acquittance, such payment constitutes a complete defense to an action by the assignee.—*Cornish v. Woolverton et al.*, 456.

BONDS.

See Injunctions, 5.

BRANDS.

See Cattle, 3.

BRIEFS.

Appeal—Points Relied upon—Failure to State—Result.

1. Where the brief of the appellant fails to show on what he relies for a reversal of the judgment, and the applicability of the propositions discussed in the brief cannot be determined without an independent investigation by the supreme court, the case stands as if no brief had been filed, and the judgment will be affirmed.—*McIntosh Hde. Co. v. Flathead County*, 254.

Service—Attorney General—Attorney of Record—Transcript.

2. The attorney general is by law (Political Code, section 460) the attorney of record in all causes pending in the supreme court to which a county may be a party, and as such he is entitled to be served with a copy of the transcript and brief.—*McIntosh Hde. Co. v. Flathead County*, 254.

Actions Against Counties—Attorney General—Transcript—Service—Dismissal.

3. An appeal by plaintiff in an action against a county may be dismissed for failure to serve the attorney general with a copy of the transcript and appellant's brief, and such dismissal unless done without prejudice, will be in effect an affirmance of the judgment. (Code of Civil Proc., sec. 1741.)—*McIntosh Hde. Co. v. Flathead County*, 254.

Failure to File—Affirmance.

4. Where both parties failed to file briefs in the Supreme Court on an appeal from an order of the district court, the order was affirmed at the cost of appellant.—*Kehoe v. Kehoe et al.*, 606.

Failure to File—Rules—Supreme Court.

5. Supreme Court Rule X, subdivision 5 (30 Mont. xxix), which provides that where an appellant is in default in filing his brief the case may be dismissed on motion, will not be relaxed where counsel was not prevented from observing it by press of other professional duties, or interruptions caused by illness or the like.—*State v. Franceschi*, 495.

BURDEN OF PROOF.

Action on Building Contracts—Corporation—Liability.

1. In an action to recover an alleged balance due on a contract for the construction of a building for a corporation, in which plaintiff sought to establish the liability of the defendant corporation for money paid in excess of a specified sum for work done by a particular person at the request of the architects, by showing consent of one or two of the defendant's trustees to the agreement, the burden was on plaintiff to show the authority of the trustees, or ratification of the agreement by the corporation.—*Wagner v. St. Peter's Hospital*, 206.

Action on Contract—Consideration—Presumptions.

2. Under Civil Code, sections 2169 and 2170, providing that a written instrument is presumptive evidence of a consideration, and that the burden of showing its want lies with the attacking party, in an action on an instrument acknowledging an indebtedness and promising to pay it, a consideration need not be averred or proven independently of the proof of the contract itself.—*Noyes v. Young et al.*, 226.

Receivers—Appointment—Exigency—Appeal—Record.

3. Under Code of Civil Procedure, section 951, authorizing the *ex parte* appointment of a receiver only when there is immediate danger of the removal, loss, or destruction of the property or fund, the burden is on the applicant to show that such an exigency exists as to authorize the appointment *ex parte*, and when the case is brought before a court of review, such showing must affirmatively appear from the record.—*Benepe-Owenhouse Co. v. Scheidegger*, 424.

Criminal Law—Jury—Challenge.

4. In a criminal prosecution the burden of proof on the trial of a challenge to the array was on the defendant interposing it.—*State v. Jones*, 442.

Tenants in Common—Action for Rents—Instructions.

5. In an action by a tenant in common against his cotenant for rents alleged to be due to the plaintiff under a contract for the erec-

tion of a building at defendant's expense, and an equal division of rents after defendant was reimbursed by receipts of rent therefrom to the extent of one-half the cost, the burden was on plaintiff to show that defendant had been so reimbursed, and an instruction casting the burden upon defendant to show by a clear preponderance of the evidence that the building cost more than the amount alleged by plaintiff was prejudicial error.—*Ayotte v. Nadeau*, 498.

CATTLE.

Sales—Claim and Delivery—Instructions—Delivery.

1. Where, in an action in claim and delivery to recover certain cattle, both parties claimed under the same seller, a requested instruction that plaintiff, whose purchase was prior in time, was not entitled to recover any of the cattle except such as had been delivered and "paid for by him," was properly refused, a vendee not being required to pay for property purchased by him in order to make the transaction valid.—*Ettien v. Drum*, 311.

Sales—Personal Property—Delivery—Presumptions.

2. *Held*, that Civil Code, section 4491, providing that a transfer of personal property, not accompanied by immediate delivery and followed by actual and continued change of possession is conclusively presumed fraudulent and void as against a subsequent purchaser in good faith, applies to a sale of range cattle.—*Ettien v. Drum*, 311.

Sales—Range Cattle—Brands—Partial Delivery—Custom.

3. Where one purchases an entire herd of range cattle, together with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of the remnant not delivered.—*Ettien v. Drum*, 311.

CERTIORARI.

When Proper Remedy—Order Taxing Costs.

1. Code of Civil Procedure, as amended by Session Laws of 1899, page 146, authorizes an appeal from a special order after final judgment. After an affirmance of a judgment on appeal the trial court made an order allowing certain costs that had not been previously allowed; the order, however, did not amend the judgment. *Held*, that *certiorari* was the proper remedy to review the order so made, it being merely an order taxing costs, not appealable, and no appeal being permissible from the judgment for the purpose of reviewing the order, since it was not included in the judgment already reviewed on appeal—*State ex rel. Boston Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

CHALLENGES.

See *Jury*, 4, 5, 6.

CHANGE OF VENUE.

See *Venue*; also *District Courts*, 13, 14, 16, 18, 27, 28, 29, 30.

CHATTEL MORTGAGES.

Affidavit of Good Faith.

1. A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors, where it is not accompanied by the affidavit of the mortgagee, required by Civil Code, sec.

tion 3861, that the same is made in good faith and without design to hinder, delay or defraud creditors.—*First Nat. Bank of Butte v. Beley et al.*, 291.

Proper Affidavit of Renewal will not Validate Void Mortgage.

2. An affidavit of renewal of a chattel mortgage, filed under Civil Code, section 3866, stating the necessary facts, does not validate a mortgage which was originally void as to attaching creditors because of the absence of the affidavit of good faith required by section 3861 of the same code, although such mortgage is good and valid between the parties to it.—*First Nat. Bank of Butte v. Beley et al.*, 291.

CLAIM AND DELIVERY.

Instructions—Sales—Cattle—Delivery.

1. Where, in an action in claim and delivery to recover certain cattle, both parties claimed under the same seller, a requested instruction that plaintiff, whose purchase was prior in time, was not entitled to recover any of the cattle except such as has been delivered and "paid for by him," was properly refused, a vendee not being required to pay for property purchased by him in order to make the transaction valid.—*Ettien v. Drum*, 311.

Pleadings—Sufficiency of Complaint.

2. A complaint alleging that defendant at divers times prior to and within one year before a certain date wrongfully and without plaintiff's consent took certain cattle from his possession; "that on the 10th day of March, 1902, plaintiff was, ever since has been, and now is the owner of the following described cattle * * * of the value of \$1,200"; that before the commencement of the action on March 10, 1902, plaintiff demanded of defendant possession of the cattle; and that defendant still unlawfully withholds them from plaintiff's possession—was good as against a general demurrer.—*McGregor v. Lang*, 568.

Appeal—Presumptions—Evidence—Support of Verdict.

3. On appeal from a judgment in claim and delivery for cattle converted by defendant, the court must presume, in the absence of the evidence, that such evidence supported the verdict, which found that plaintiff was the owner of only part of the cattle claimed, and placed a value upon the part, averaging more per head than the sum claimed for all averaged per head.—*McGregor v. Lang*, 568.

Verdict—Implied Findings.

4. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action.—*McGregor v. Lang*, 568.

Judgment—Description of Property—Sufficiency.

5. In an action for claim and delivery, the jury found by general verdict that plaintiff "is the owner and entitled to the possession of the following described animals: Twenty-six steers branded $\frac{1}{1}$ on the left side, and fish or dove tail earmarks; * * * ten heifers, branded $\frac{1}{1}$ on the left side, and fish or dove tail earmarks. * * *" The judgment ordered that plaintiff have and recover the property described in the verdict. *Held*, that the judgment was not so vague and uncertain in the description of the property as to render it impossible to identify the animals and enable defendant to make a return thereof.—*McGregor v. Lang*, 568.

Complaint—Insufficiency.

6. *Obiter*: A complaint in claim and delivery is fatally defective which upon its face shows that the defendant did not have the property in his possession at the time the action was brought.—*Mears v. Shaw*, 575.

Measure of Damages—Market Value.

7. The amount plaintiff in claim and delivery may recover, in case a redelivery cannot be had, is the market value of the property when the taking occurred or the wrongful detention began.—*Osmers v. Furey et al.*, 581.

Measure of Damages—Cost Price.

8. In ascertaining the market value of personalty in claim and delivery, the cost price may be considered as one fact tending to establish it.—*Osmers v. Furey et al.*, 581.

Order of Proof—Burden of Proof—Justification—Rebuttal—Practice.

9. In an action in claim and delivery for furniture of plaintiff seized by defendant under an alleged lien for rent, it was only incumbent on plaintiff, in making her case in chief, to prove ownership of the furniture, and the taking and detention by defendants against her consent, the burden of justification being on defendants, and, after introduction of their evidence, plaintiff could in rebuttal show the eviction, and that no rent was due.—*Osmers v. Furey et al.*, 581.

Counterclaims—Money Judgment—Instructions.

10. *Held*, in an action in claim and delivery for furniture of plaintiff, seized by defendant lessor under an alleged lien for rent, wherein defendant set up a counterclaim for rent, damages to the leased premises, etc., that, as a claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, in no way tended to defeat or diminish plaintiff's right to recover possession of the property, an instruction to disregard evidence in support of defendant's counterclaim, except so far as showing rent due at the time of the taking, which would be a justification therefor, was correct.—*Osmers v. Furey et al.*, 581.

Cause of Action—Subject of the Action.

11. The transaction set forth in the complaint, in an action in claim and delivery for furniture of plaintiff lessee seized by defendant lessor under an alleged lien for rent, being the wrongful taking of the property, the cause of action alleged in defendants' counterclaim for water rent, plumbing, etc., or damages to the building etc., did not arise out of the transaction, nor was it connected with the subject of the action.—*Osmers v. Furey et al.*, 581.

Judgment—Damages—Remittal—Effect—New Trial.

12. In an action in claim and delivery for property alleged to have been wrongfully seized by defendant, there was no evidence to sustain a finding for damages for the taking, and plaintiff remitted damages awarded by the verdict, judgment being entered in the alternative for the return of the property or for the value thereof. *Held* that, as defendants secured all the relief to which they were entitled, the fact that the usual course in such cases was not pursued was not sufficient ground for a new trial.—*Osmers v. Furey et al.*, 581.

CLERICAL ERRORS.

See Mortgages, 1.

of prosecutrix, no additional evidence is necessary to support a verdict of guilty.—*State v. Jones*, 442.

Rape—New Trial—Newly Discovered Evidence—Insufficiency.

13. In a prosecution for rape, newly discovered evidence examined, and held insufficient to warrant a new trial.—*State v. Jones*, 442.

Rape—New Trial—Newly Discovered Evidence—Cumulative.

14. To entitle defendant, convicted of the crime of rape, to a new trial on the ground of newly discovered evidence, it must appear, among other things, that the new evidence be not cumulative merely.—*State v. Jones*, 442.

CROSS-EXAMINATION.

See Evidence, 18; Contracts, 15.

CUSTOMS.

Statutes.

1. A custom cannot vary the terms of, or operate to abrogate or repeal, a general statute.—*Ettien v. Drum*, 311.

Sales—Range Cattle—Brands—Partial Delivery.

2. Where one purchases an entire herd of range cattle, together with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of the remnant not delivered.—*Ettien v. Drum*, 311.

DAMAGES.

Measure of—Sales—Breach of Warranty—Instructions.

1. Where the defense in an action for the price of a stove is framed so as to give defendant the benefit of section 4314 of the Code of Civil Procedure, in relation to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages, under section 4313, for the breach of warranty of the quality of the articles sold.—*Lander v. Sheehan*, 25.

Measure of—Receivers—Wrongful Appointment—Presumptions.

2. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of—Conversion—Election.

3. Under Civil Code, section 4333, providing for two measures of damages for the wrongful conversion of personal property, the party injured must elect under which of these two options he will claim, and he may not be permitted to rely upon both in the same case.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

CONTEMPT.

Supervisory Control—Pleading—Demurrer.

1. A petition for an order to show cause why S. should not be punished for contempt of court in violating a decree, and affidavits in its support having been filed in the district court, they were demurred to upon the ground that they did not state facts sufficient to constitute contempt. The demurrer was sustained. Relators applied for writ of supervisory control. *Held*, that the question whether the decree alleged to have been violated was sustained by the pleadings and the evidence, could not be considered by the district court on the demurrer, it having had jurisdiction of the parties and the subject matter, and the writ ordered issued directing the district court to set aside and vacate the order sustaining the demurrer and fix a date for the hearing of the petition.—State ex rel. Hempstead v. District Court et al., 1.

Supervisory Control—Failure to Pay Alimony—Review.

2. An order made in a divorce suit restraining defendant from disposing of his property was so modified as to allow him to mortgage certain property in order to comply with an order of court awarding plaintiff alimony and counsel fees, and to pay certain debts. Defendant mortgaged the property, paid counsel fees and two months' alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses, failing thereafter to pay the alimony awarded. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in such an arbitrary or unlawful manner as to entitle defendant to a writ of supervisory control.—State ex rel. Dougan v. District Court et al., 34.

Notaries Public—Power of District Court to Punish.

3. *Quære*: Under Code of Civil Procedure, section 3306, may the district court lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the district court?—State ex rel. Heinze v. District Court et al., 394.

CONTINGENCIES.

See Contracts, 7, 13.

CONTINUANCE.

Party not Ready for Trial.

1. Error cannot be predicated on the overruling of plaintiff's objection to immediately proceeding to trial on the ground that he was not ready for trial, where there was no application for continuance, and no showing why plaintiff could not try the case then as well as at any time.—Finlen v. Heinze et al., 354.

CONTRACTS.

Building—Subcontractor—Judgment—*Res Judicata*—Owner.

1. Where a subcontractor did the painting of a building for the contractor who had undertaken the construction of the entire building, a judgment in favor of the subcontractor, in a suit by him against the principal contractor to recover on account of the work done, is not *res judicata* as to the owner, so as to bar litigation of the question, between the owner and the principal contractor, whether the painting was done in accordance with the principal contract.—Wagner v. St. Peter's Hospital, 206.

Action on Building Contract—Corporation—Liability—Burden of Proof.

2. In an action to recover an alleged balance due on a contract for the construction of a building for a corporation, in which plaintiff sought to establish the liability of the defendant corporation for money paid in excess of a specified sum for work done by a particular person at the request of the architects, by showing consent of one or two of the defendant's trustees to the agreement, the burden was on plaintiff to show the authority of the trustees, or ratification of the agreement by the corporation.—*Wagner v. St. Peter's Hospital*, 206.

Action on Building Contract—Lien—Pleadings—Answer—Replication.

3. Where a building contract provided that the owner might protect itself against any lien which might be filed on the building by withholding from the contractor a sum sufficient to liquidate the same, and in an action by the contractor to recover an alleged balance due on the contract, the defendant alleged in its answer that a lien was filed for a certain sum and was paid by the defendant, the failure of the plaintiff to deny the allegations by his replication entitled the defendant to a deduction from the contract price in the amount of the lien discharged.—*Wagner v. St. Peter's Hospital*, 206.

Mines—Licenses—Verbal Agreement—Revocation—Rights of Licensees.

4. A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license, revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a right to the ore, as personality, when extracted from the mine.—*Clark v. Wall et al.*, 219.

What may Constitute.

5. An instrument arising from, and based upon, transactions had between the parties at its date, acknowledging an indebtedness, and promising to pay it, is a contract.—*Noyes v. Young et al.*, 226.

Consideration—Presumptions—Burden of Proof.

6. Under Civil Code, sections 2169 and 2170, providing that a written instrument is presumptive evidence of a consideration, and that the burden of showing its want lies with the attacking party, in an action on an instrument acknowledging an indebtedness and promising to pay it, a consideration need not be averred or proven independently of the proof of the contract itself.—*Noyes v. Young et al.*, 226.

Contingency—Uncertainty.

7. In an action on an instrument acknowledging an indebtedness, and promising to pay it on the happening of a certain contingency, the actual occurrence of the contingency renders untenable a contention that the contract is void for uncertainty.—*Noyes v. Young et al.*, 226.

Merger of Oral into Written—Consideration—Liability.

8. A promisor may bind himself by merging an oral agreement into a written contract, and he cannot escape liability merely because the consideration had passed to him prior to the execution of the written contract.—*Noyes v. Young et al.*, 226.

Nonsuit—When Properly Overruled—Pleadings.

9. A motion for nonsuit was properly overruled where, in an action on an instrument acknowledging an indebtedness and promising to pay it on the happening of a certain contingency, the answer admitted the execution of the instrument, its assignment to the plaintiff, the happening of the contingency, and nonpayment.—*Noyes v. Young et al.*, 226.

Forbearance to Sue—Consideration—Sufficiency.

10. Forbearance to sue is a sufficient consideration to sustain a written contract.—*Noyes v. Young et al.*, 226.

Parol Evidence—Consideration—Forbearance to Sue.

11. Parol evidence is admissible to show that the consideration for a written contract was forbearance to sue.—*Noyes v. Young et al.*, 226.

Consideration—Forbearance to Sue—Instructions.

12. Where a sister of a decedent makes a claim in behalf of the decedent's estate, and her right to recover was disputed by the alleged debtor, the settlement of the claim, or the agreement to forbear suing thereon, was a sufficient consideration for the execution of a contract between the sister and the alleged debtor, and in an action thereon it was not necessary to determine whether the sister, decedent's father and mother surviving, could have successfully maintained the claim against the alleged debtor, and an instruction to that effect was properly refused.—*Noyes v. Young et al.*, 226.

Contingency—Limitations.

13. Where a contract was made to become due on the happening of a certain contingency, a suit brought within eight years after the happening of the contingency, but more than eight years from the date of the execution of the contract, was not barred.—*Noyes v. Young et al.*, 226.

Resulting Trusts—Arise by Operation of Law—Not Dependent upon Contracts.

14. The trust presumed to result, under Civil Code, section 1312, in favor of the person who pays the consideration for the purchase of property, title to which is taken in the name of another, does not arise from, or depend upon, a contract or agreement between the parties, but is independent thereof and arises by operation of law, though such agreements may be considered in establishing the ownership of the money and how it was invested.—*Lynch v. Herrig*, 267.

Mining Corporations—Money Advanced—Liability—Cross-examination.

15. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff as general manager, in payment of services of certain employees of defendant, a written contract between the plaintiff and defendant, providing that the plaintiff should at no time during the continuance of the agreement incur any indebtedness in excess of the value of the result of the operations which should create any liability against the company, and limiting plaintiff's compensation to twenty per cent of the net proceeds of the mining operations, was admissible as part of the cross-examination of the plaintiff.—*Farrell v. Gold Flint Mining Co.*, 416.

Tenants in Common—Use of Property.

16. Tenants in common may contract with reference to the use of the common property, since their respective interests in it partake in great measure of estates in severalty.—*Ayotte v. Nadeau*, 498.

Tenants in Common—Consideration.

17. The exclusive use of a building on the common property by one cotenant is a sufficient consideration to support his promise to the other to pay rent therefor at a stipulated rate.—*Ayotte v. Nadeau*, 498.

Tenants in Common—Action for Rents—Statute of Frauds.

18. A contract between tenants in common for the erection of a house on the common property by one at his own expense, and requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, is not within Civil Code, section 2340, providing that certain contracts for the sale of personal prop-

erty shall not be enforceable unless in writing, nor within section 2342 of the same code, making the same provision in relation to contracts for the sale of land or any interest therein.—*Ayotte v. Nadeau*, 498.

Tenants in Common—Action for Rents—Statute of Frauds.

19. Where a contract between plaintiff and defendant as tenants in common provided for the erection of a house on the common property by defendant at his own expense, requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, and there was an immediate performance by plaintiff by his surrender to defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent should pay for the erection of the building, the contract was enforceable irrespective of the Civil Code, section 2185, subdivision 1, which provides that an agreement not to be performed within a year is invalid unless in writing, such subdivision 1 being applicable to those contracts only which *by their terms* are not to be performed within one year by *either party*.—*Ayotte v. Nadeau*, 498.

Tenants in Common—Action for Rents—Statute of Frauds.

20. A contract between tenants in common for the erection of a house on the common property by one of them at his own expense, and requiring him to make an equal division of the rents when the rents received equaled one-half the cost, is not a contract of leasing within Civil Code, section 2185, subdivision 5, providing that an agreement for the leasing of real property for a longer period than one year is invalid unless in writing.—*Ayotte v. Nadeau*, 498.

Breach—Complaint.

21. Where, in an action for breach of contract to purchase certain milk, the complaint alleged that plaintiff was then and there able, ready and willing, and offered to perform all the terms and conditions of the contract to be performed by him during the term of the contract and was and would be during the entire continuance of the contract able, ready and willing to perform the same and had offered so to do, etc., it was not objectionable for failure to allege in terms that plaintiff had "fully complied with all the terms and conditions of the contract by him to be kept and performed."—*Brazell v. Cohn et al.*, 556.

Instructions.

22. In an action for breach of contract, a requested instruction that the jury, in fixing damages for nonperformance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance of the contract, was vague and indefinite, and not authorized by Civil Code, section 4301, providing that no damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin.—*Brazell v. Cohn et al.*, 556.

Breach—Evidence—Prejudice.

23. Where, in an action for breach of contract to purchase certain milk the court sustained an objection to a question asked of one of defendants' employees whether there was any effort on defendant's part, or anyone acting under him, to break the contract, the fact that before a ruling on the question was finally made the witness stated that he did not want to answer the question unless he had to, that he was in the confidence of the defendants, and did not want to be placed in the position of telling what happened and what did not happen, the question thus remaining unanswered, was not reversible error.—*Brazell v. Cohn et al.*, 556.

Breach—Damages.

24. In an action for breach of a contract to purchase all of the milk of plaintiff and his assignor for a period of five years from November, 1899, defendants having repudiated the contract, plaintiff was entitled to recover the difference between the market and the contract price of milk he would have produced during the contract period, regardless of the fact that after defendant's breach of contract plaintiff disposed of his milk business, and was therefore unable thereafter to perform the contract on his part.—*Brazell v. Cohn et al.*, 556.

Breach—Reduction of Damages.

25. Where defendants broke a contract to purchase all of plaintiff's milk at wholesale for a specified price per gallon for five years, plaintiff was not thereafter required to change the character of his business, and sell his milk at retail, in order to reduce his damages.—*Brazell v. Cohn et al.*, 556.

CONTRIBUTORY NEGLIGENCE.

See *Negligence*, 1, 3.

CONVERSION.**Measure of Damages—Election.**

1. Under Civil Code, section 4333, providing for two measures of damages for the wrongful conversion of personal property, the party injured must elect under which of these two options he will claim, and he may not be permitted to rely upon both in the same case.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of Damages—Election—Instructions.

2. Where a party in his complaint and by his evidence seeks to recover damages for the wrongful conversion of personal property under one of two measures granted by the statute, an instruction authorizing the assessment of damages according to the other standard is erroneous.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Conflicting Instructions—Measure of Damages—Harmless Error.

3. The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided for under Civil Code, section 4333, only one of which options could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

CONVEYANCES.

See, also, *Homesteads*, 2.

Mortgage.

1. A mortgage is a conveyance within the meaning of Civil Code, sections 1640, 1641 and 1642, though of a chattel interest only.—*Cornish v. Woolverton et al.*, 456.

CORPORATIONS.**Trustees—Powers.**

1. A corporation is not liable on an agreement made by one or two of its trustees, in the absence of authority to bind the corporation having been delegated to such trustees, or ratification of the agreement by the corporation.—*Wagner v. St. Peter's Hospital*, 206.

Liability—Action on Building Contracts—Burden of Proof.

2. In an action to recover an alleged balance due on a contract for the construction of a building for a corporation, in which plaintiff sought to establish the liability of the defendant corporation for money paid in excess of a specified sum for work done by a particular person at the request of the architects, by showing consent of one or two of the defendant's trustees to the agreement, the burden was on plaintiff to show the authority of the trustees, or ratification of the agreement by the corporation.—*Wagner v. St. Peter's Hospital*, 206.

Mining—Money Advanced by Employee—Recovery.

3. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff, general manager of the company, in payment of services of certain employees of defendant, testimony of plaintiff that he turned over certain concentrates to the secretary of the defendant, and that he advanced the money with the understanding that he should be reimbursed therefor from the proceeds of the concentrates, conclusively limited his recovery to the amount realized from the sale of such concentrates.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining—Money Advanced—Recovery—Evidence.

4. In an action against a mining corporation to recover money alleged to have been advanced by him, as general manager of the company, in payment of services of certain employees of defendant, with the understanding that he be reimbursed from the proceeds of certain concentrates turned over to the secretary of the corporation, plaintiff was not entitled to recover in the absence of evidence showing that the concentrates were sold and a sum sufficient to reimburse him received therefrom.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining—Powers of Secretary.

5. The secretary of a mining company, who is not a member of the board of directors nor the agent of the corporation, has no authority to act for it beyond that given him as such secretary.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining—Liability—Directors—Evidence.

6. Evidence that three directors of a mining corporation acknowledged the justness of a claim against the corporation, and agreed that it should be paid, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity, does not establish an obligation against the corporation.—*Farrell v. Gold Flint Min. Co.*, 416.

Act Through Boards of Directors.

7. A corporation acts through its board of directors as an entity, and not through the individuals who compose such board.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining—Money Advanced—Liability—Cross-examination.

8. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff as general manager, in payment of services of certain employees of defendant, a written contract between the plaintiff and defendant, providing that the plaintiff should at no time during the continuance of the agreement incur any indebtedness in excess of the value of the result of the operations which should create any liability against the company, and limiting plaintiff's compensation to twenty per cent of the net proceeds of the mining operations, was admissible as part of the cross-examination of the plaintiff.—*Farrell v. Gold Flint Min. Co.*, 416.

COSTS.

Order Taxing—*Certiorari*—When Proper Remedy.

1. Code of Civil Procedure, as amended by Session Laws of 1899, page 146, authorizes an appeal from a special order after final judgment. After an affirmance of a judgment on appeal the trial court made an order allowing certain costs that had not been previously allowed; the order, however, did not amend the judgment. *Held*, that *certiorari* was the proper remedy to review the order so made, it being merely an order taxing costs, not appealable, and no appeal being permissible from the judgment for the purpose of reviewing the order, since it was not included in the judgment already reviewed on appeal.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

District Courts—Order Taxing—Omission of Item—Remedy.

2. After an allowance by the district court for necessary costs and disbursements has been made to a party, and a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omission corrected, or an appeal from the judgment to have the error thus committed reviewed, otherwise he becomes bound by the judgment.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Order Taxing—Omission of Items—Inadvertence—Appeal.

3. Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him, which judgment had been affirmed on appeal by defendant, the trial court had no authority, after affirmance, to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court, since the Code of Civil Procedure, section 774, providing that the court may relieve a party from an order made through his mistake, inadvertence, or excusable neglect, applies only to the mistake, inadvertence, surprise or excusable neglect of the party litigant and not of the court.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Appeal—Failure to File Briefs—Result.

4. Where both parties failed to file briefs in the Supreme Court on an appeal from an order of the district court, the order was affirmed, at the cost of appellant.—*Kehoe v. Kehoe et al.*, 606.

Security—Application—Notice.

5. *Held*, that, where defendant did not apply for an order requiring plaintiff, a nonresident of the State, to give security for costs until the day on which the cause was set for trial, and where no previous notice of such demand had been given, the district court was justified in denying a stay until the cost bond was given, on the ground that the application was made too late.—*Erazell v. Cohn et al.*, 556.

COUNTERCLAIMS.

Claim and Delivery—Money Judgment—Instructions.

1. *Held*, in an action in claim and delivery for furniture of plaintiff, seized by defendant lessor under an alleged lien for rent, wherein defendant set up a counterclaim for rent, damages to the leased premises, etc., that as a claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, in no way tended to defeat or diminish plaintiff's right to recover possession of the property, an instruction to disregard evidence in support of defendant's counterclaim, except so far as showing rent due at the time of

the taking, which would be a justification therefor, was correct.—*Osmer v. Furey et al.*, 581.

Claim and Delivery—Cause of Action—Subject of the Action.

2. The transaction set forth in the complaint, in an action in claim and delivery for furniture of plaintiff lessee seized by defendant lessor under an alleged lien for rent, being the wrongful taking of the property, the cause of action alleged in defendants' counterclaim for water rent, plumbing, etc., or damages to the building, etc., did not arise out of the transaction, nor was it connected with the subject of the action.—*Osmer v. Furey et al.*, 581.

Motion to Strike.

3. On the filing of an answer improperly interposing a counterclaim, plaintiff's motion to strike out the counterclaim should have been allowed.—*Osmer v. Furey et al.*, 581.

COUNTIES.

See, also, Equalization, Board of.

Actions Against—Attorney General—Transcript—Briefs—Service—Dismissal.

1. An appeal by plaintiff in an action against a county may be dismissed for failure to serve the attorney general with a copy of the transcript and appellant's brief, and such dismissal, unless done without prejudice, will be in effect an affirmance of the judgment. (Code of Civil Proc., sec. 1741.)—*McIntosh Hde. Co. v. Flathead County*, 254.

Duties of Officers—Legislature—Constitution.

2. The legislature may not enact any law in conflict with constitutional provisions defining the duties of county officers; but so far as such duties are not prescribed by the Constitution, they may be by legislative enactment.—*Missouri River Power Co. v. Steele*, 433.

Board of Appraisers—Statutes—Constitutionality—Assessor.

3. *Held*, that in creating a board of appraisers to fix the valuation of real property for the purpose of assessment by Act of fifth legislative assembly (Session Laws of 1897, p. 195), the legislature was acting within its authority, and that in clothing the board with power to fix the valuation on real property in the first instance, no provision of the Constitution was contravened; hence a taxpayer had no right to have his property taxed on the valuation as made by the assessor.—*Missouri River Power Co. v. Steele*, 433.

Legislature—County Offices—Power to Create.

4. The legislature may create new county offices and devolve upon them duties respecting the management and control of county affairs. *Missouri River Power Co. v. Steele*, 433.

CRIMINAL LAW.

Municipal Corporations—Police Regulations—Infractions not Crimes—Action in Name of City.

1. Infractions of local police regulations, such as noncompliance with an ordinance making it the duty of an occupant of premises within city limits to keep them free from snow, ice, etc., are not, in their essence, crimes or misdemeanors, and actions arising out of them are properly prosecuted in the name of the city.—*City of Helena v. Kent*, 279.

Rape—Information.

2. In an information charging defendant with rape of a female under the age of sixteen years, the phrase "to wit, of the age of fourteen years and upwards," while it might have been omitted, was not confusing as to the meaning of the language employed.—*State v. Jones*, 442.

Rape—Information—Surplusage—Presumptions.

3. In an information charging rape of a female under sixteen years of age, the words "against the consent of said" prosecutrix, are merely surplusage, the law presuming that such a child is incapable of giving consent, and but one offense is charged.—*State v. Jones*, 442.

Jury—Challenge—Burden of Proof.

4. In a criminal prosecution the burden of proof on the trial of a challenge to the array was on the defendant interposing it.—*State v. Jones*, 442.

Challenge to Panel—Evidence.

5. Penal Code, section 2038, provides that, where a challenge to the panel is denied, the court must proceed to try the question of fact. *Held*, that where defendant's offer to submit such a challenge on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied.—*State v. Jones*, 442.

Jurors—Implied Bias—Challenges—Exceptions.

6. Under Penal Code, section 2170, an exception is allowed to the action of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Presumptions.

7. In prosecutions for rape, evidence of previous good character of defendant is never conclusive, as a matter of law, in favor of defendant, and does not of itself raise a presumption in his favor.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Purpose.

8. In a prosecution for rape, evidence of defendant's previous good character is evidence which the jury should consider, together with all the other evidence in the case in determining whether or not the accused is guilty beyond a reasonable doubt.—*State v. Jones*, 442.

Rape—Erroneous Instruction—Previous Good Character of Defendant.

9. In a prosecution for rape, to instruct that evidence of previous good character is conclusive in favor of defendant, and that it raises a presumption in his favor, is for the court to invade the province of the jury, and determine the weight or effect to be given to particular evidence.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Correct Instruction.

10. In a prosecution for rape, an instruction that if, from a consideration of the evidence, the jury believed defendant guilty beyond a reasonable doubt, they should so declare, notwithstanding they might be satisfied that prior to committing the offense of which he was accused defendant was a man of good reputation and character, was correct.—*State v. Jones*, 442.

Conflicting Instructions—Harmless Error—When.

11. Where, in a criminal prosecution, an instruction correctly stating the law is in conflict with an erroneous one in defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two.—*State v. Jones*, 442.

Rape—Testimony of Prosecutrix—When Sufficient to Convict.

12. In a prosecution for rape, where the jury believe the testimony

of prosecutrix, no additional evidence is necessary to support a verdict of guilty.—*State v. Jones*, 442.

Rape—New Trial—Newly Discovered Evidence—Insufficiency.

13. In a prosecution for rape, newly discovered evidence examined, and held insufficient to warrant a new trial.—*State v. Jones*, 442.

Rape—New Trial—Newly Discovered Evidence—Cumulative.

14. To entitle defendant, convicted of the crime of rape, to a new trial on the ground of newly discovered evidence, it must appear, among other things, that the new evidence be not cumulative merely.—*State v. Jones*, 442.

CROSS-EXAMINATION.

See Evidence, 18; Contracts, 15.

CUSTOMS.

Statutes.

1. A custom cannot vary the terms of, or operate to abrogate or repeal, a general statute.—*Ettien v. Drum*, 311.

Sales—Range Cattle—Brands—Partial Delivery.

2. Where one purchases an entire herd of range cattle, together with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of the remnant not delivered.—*Ettien v. Drum*, 311.

DAMAGES.

Measure of—Sales—Breach of Warranty—Instructions.

1. Where the defense in an action for the price of a stove is framed so as to give defendant the benefit of section 4314 of the Code of Civil Procedure, in relation to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages, under section 4313, for the breach of warranty of the quality of the articles sold.—*Lander v. Sheehan*, 25.

Measure of—Receivers—Wrongful Appointment—Presumptions.

2. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of—Conversion—Election.

3. Under Civil Code, section 4333, providing for two measures of damages for the wrongful conversion of personal property, the party injured must elect under which of these two options he will claim, and he may not be permitted to rely upon both in the same case.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of—Conversion—Election—Instructions.

4. Where a party in his complaint and by his evidence seeks to recover damages for the wrongful conversion of personal property under one of two measures granted by the statute, an instruction authorizing the assessment of damages according to the other standard is erroneous.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of—Conversion—Conflicting Instructions—Harmless Error.

5. The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided for under Civil Code, section 4333, only one of which options could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Measure of—Receivers—Wrongful Appointment—Attachment.

6. The fact that accounts and bills belonging to a corporation, which were not collected owing to the wrongful institution of receivership proceedings by defendants, were taken possession of by an attachment to satisfy an indebtedness of the corporation, does not affect the measure of the corporation's damages for the wrongful receivership.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Sales—Breach of Contract—Reduction of Damages.

7. Where defendants broke a contract to purchase all of plaintiff's milk at wholesale for a specified price per gallon for five years, plaintiff was not thereafter required to change the character of his business, and sell his milk at retail, in order to reduce his damages.—*Brazell v. Cohn et al.*, 556.

Measure of—Claim and Delivery—Market Value.

8. The amount plaintiff in claim and delivery may recover, in case a redelivery cannot be had, is the market value of the property when the taking occurred or the wrongful detention began.—*Osmers v. Furey et al.*, 581.

Measure of—Claim and Delivery—Cost Price.

9. In ascertaining the market value of personalty in claim and delivery, the cost price may be considered as one fact tending to establish it.—*Osmers v. Furey et al.*, 581.

DEEDS.

Appurtenances—Extrinsic Evidence.

1. Where a deed to certain land does not specify the particular appurtenant water right alleged to have been conveyed by it, extrinsic evidence may be resorted to to establish such right.—*Bullerdick v. Hermesmyer et al.*, 541.

DEFAULT.

Judgments—Vacation—Inadvertence—Excusable Neglect.

1. After *remittitur* from the supreme court had been filed, plaintiff filed an amended complaint, which was served on the stenographer of defendant's attorneys during their absence, and, upon defendant's failure to answer, judgment was rendered by default. Immediately on defendant's acquiring knowledge thereof, it obtained a stay of execution, presented a motion to set aside the default, and for leave to answer, alleging that by the negligence of the stenographer the amended complaint had been lost, and had never been called to the attention

of its attorneys. One of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the *remittitur*, but the clerk had failed to do so, and, though such attorney met plaintiff's attorney nearly every day, he had never referred to the filing of such amended complaint. *Held*, that such facts, with a proposed answer, which put in issue all the material allegations of the amended complaint, entitled defendant to a vacation of the default judgment, under Code of Civil Procedure, section 774, authorizing the court to relieve a party, in its discretion, from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and that the court erred in overruling the motion.—*Greene v. Montana Brewing Co.*, 102.

DEFENSES.

Special—Pleadings—Answer—Contributory Negligence.

1. In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in defendant's answer.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Special—Negligence—Fellow-servant—Pleadings.

2. *Quære*: Is the defense of negligence of a fellow-servant in an action for damages for injury of person, a special defense which must be pleaded?—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Special—Divorce—Condonation—Pleadings.

3. While, generally speaking, condonation in an action for divorce is a special defense not available unless pleaded, yet when, though not pleaded, the issue has been contested in the evidence without objection, and it clearly appears that the offense alleged in the complaint has been condoned, the divorce will be denied.—*Bordeaux v. Bordeaux*, 159.

DELIVERY.

See *Sales*, 4, 5, 6.

DISTRICT COURTS.

Habeas Corpus—For What Purpose Writ may not be Used.

1. The district court may not use the writ of *habeas corpus* for the purpose of reviewing the action of a committing magistrate in applying a deposit, in lieu of bail, to the payment of a fine assessed against complainant; nor has it jurisdiction to determine, under the writ, who is entitled to the money, or direct the city treasurer, to whom it had been paid to refund it to complainant.—*State ex rel. City of Butte et al. v. District Court et al.*, 18.

Judgment—Appeal—Affirmance—Reopening Case.

2. When, upon appeal to the supreme court, a judgment of the district court has been reviewed and affirmed, or a specific judgment ordered to be entered in the case, it becomes final, and the district court cannot then proceed to reopen the case and allow new issues to be framed to try rights already settled, or amend or modify the judgment of the supreme court so as to enlarge or narrow its scope.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. District Court*, 20.

Order Taxing Costs—Omission of Item—Remedy.

3. After an allowance by the district court for necessary costs and disbursements has been made to a party, and a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omis-

sion corrected, or an appeal from the judgment to have the error thus committed, reviewed, otherwise he becomes bound by the judgment.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. District Court*, 20.

Order Taxing Costs—Omission of Items—Inadvertence—Appeal.

4. Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him, which judgment had been affirmed on appeal by defendant, the trial court had no authority, after affirmance, to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court, since the Code of Civil Procedure, section 774, providing that the court may relieve a party from an order made through his mistake, inadvertence or excusable neglect, applies only to the mistake, inadvertence, surprise or excusable neglect of the party litigant and not of the court.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Order—Inadvertence—Relief—When.

5. By the express provisions of Code of Civil Procedure, section 774, the trial court cannot relieve a party from an order entered against him by his inadvertence, etc., unless application is made within six months.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. Dist. Court*, 20.

Mandamus—When It Will not Lie.

6. *Obiter*: Where a district court has acted in a given particular, *mandamus* will not lie to correct the error in so acting.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Justices of the Peace—Appeal—Jurisdiction.

7. Where a justice of the peace had no jurisdiction of the subject matter of an action, the district court could acquire none by appeal.—*Oppenheimer v. Regan*, 110.

Receivers—Counsel—Contract of Employment.

8. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding upon the court, as it is its function to determine both the necessity for counsel and the compensation to be allowed therefor.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Departments—Rules—Jurisdiction.

9. The several departments of a district court, presided over by different judges, constitute but one court, and the assignment of any portion of the business, by virtue of its rules, to any department, still leaves it pending in the district court, and jurisdiction is not lost by the fact that it may theretofore have been pending in another department or before another judge.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

Rules—Force and Effect.

10. After the district court has adopted rules, under the limitations prescribed by Code of Civil Procedure, section 111, they have the force of statutes, and become binding upon it and litigants.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

Rules—To be Enforced—When.

11. Rules of district courts should be enforced, except when the court, for good cause shown, relaxes them in order that justice may be done.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

Departments—Distribution of Business—Order Binding.

12. After a district court, consisting of two or more departments, has distributed its business among the several departments by an or-

der, concurred in by all the judges, such order should be held binding, even in the absence of rules, until revoked or modified by the authority that made it.—State ex rel. Nissler et al. v. Donlan et al., 256.

Statutes—Fair Trial—Bias and Prejudice—Judges—Disqualification—Probate Proceedings.

13. The provisions of section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws 1903, Second Extra. Session, p. 9), declaring that no judge shall continue to preside in any action or proceeding after an affidavit of bias or prejudice on his part has been filed, are applicable to probate proceedings.—State ex rel. Nissler et al. v. Donlan et al., 256.

Statutes—Fair Trial—Judges—Disqualification—Affidavit—When to be Filed.

14. Under Code of Civil Procedure, section 180, as amended by Laws of 1903 (Second Extra. Session, page 9), providing that no judge shall act in any civil action or proceeding in which an affidavit of disqualification has been filed at any time before the day fixed for the trial or hearing, such affidavit is not effective to interrupt a hearing after the day fixed for it, no matter whether it be a final hearing or trial, or merely a step taken in the case involving a decision of some controverted matter.—State ex rel. Nissler et al. v. Donlan et al., 256.

Referees—Findings and Recommendations—Setting Aside.

15. *Quære*: May a trial court disregard the findings and recommendations of a referee, under an order of reference contemplating the report of a final decree settling an account in accordance with the findings of fact and conclusions of law of the referee?—State ex rel. Nissler et al. v. Donlan et al., 256.

Prohibition—Judges—Disqualification—Fair Trial.

16. Prohibition does not lie to stay a district judge from proceeding further in the hearing of a motion made in a probate proceeding, where an affidavit of disqualification was not filed before the day fixed for the hearing of such motion. (Laws of 1903, Second Extra. Session, p. 9.)—State ex rel. Nissler et al. v. Donlan et al., 256.

Specific Performance—Evidence.

17. The district court, in an action to enforce specific performance of an oral agreement for the sale of real property, should weigh the evidence adduced in the light of the circumstances surrounding the transaction, and particularly with reference to the reasonableness or unreasonableness of the respective statements made by the principal actors in the case.—Finlen v. Heinze et al., 354.

Change of Venue—Disqualification of Judges.

18. Under Code of Civil Procedure, section 615, subdivision 4 (before amendment by Act of 1903), authorizing change of venue "when from any cause the judge is disqualified from acting," the ground for change must be one of the causes enumerated in section 180 of the same code as disqualifying a judge to sit in an action.—Finlen v. Heinze et al., 354.

Transfer of Cause from One Department to Another—Rules.

19. The transfer of a cause from one department to another of a district court is controlled by the rules adopted by such court.—Finlen v. Heinze et al., 354.

Transfer of Cause Between Departments—Irregularity.

20. A party may not complain of irregularity in the transfer of a cause from one department to another of a district court, in the absence of a showing that he was prejudiced by the transfer.—Finlen v. Heinze et al., 354.

Witnesses—Exclusion from Courtroom—Discretion.

21. Under Code of Civil Procedure, section 3371, providing that if either party requires it, the judge may exclude from the courtroom any witness of the adverse party not under examination, the application to exclude is addressed to the sound legal discretion of the trial court, subject to review only for a manifest abuse of such discretion.—*Finlen v. Heinze et al.*, 364.

Impeaching Witness—Judges—Corrupt Decision.

22. Plaintiff, for the purpose of affecting the credibility of defendant's witness, may show that he was the active agent in procuring a person to negotiate with the judge on a former trial of the cause for a corrupt decision in favor of defendant.—*Finlen v. Heinze et al.*, 354.

Written Opinions of—How Viewed by Supreme Court.

23. A written opinion of the district court upon matters and points in controversy in an original application to the supreme court, for a writ of prohibition to restrain that court from acting upon a motion pending before it, submitted in brief of counsel, not being properly before the court, will not be looked to for the purpose of ascertaining the intention of the inferior tribunal in the premises.—*State ex rel. Heinze v. District Court et al.*, 394.

Notaries Public—Contempt—Power of District Court to Punish.

24. *Quære*: Under Code of Civil Procedure, section 3306, may the district court lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the district court?—*State ex rel. Heinze v. Dist. Court et al.*, 394.

New Trial—Discretion.

25. An application for a new trial is addressed to the sound legal discretion of the trial court.—*State v. Jones*, 442.

Supervisory Control—When Issuance Premature.

26. While the lower court is proceeding within jurisdiction and before it has exceeded it, the invocation of action on the part of the supreme court by writ of supervisory control or otherwise is premature.—*State ex rel. Heinze v. District Court et al.*, 579.

Disqualification of Judge—Affidavit—Notice.

27. Notice of the filing of an affidavit disqualifying a judge, under section 180 of the Code of Civil Procedure, as amended by Act of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, need not be given to the adverse party.—*State ex rel. Jenkins v. District Court et al.*, 595.

"Fair Trial Bill"—Calling in Another Judge of Same Court.

28. *Quære*: After an affidavit disqualifying one judge of a court has been filed under the provisions of the "Fair Trial Bill," and a motion for change of venue made, as required by section 615 of the Code of Civil Procedure, as amended, may the disqualified judge call in another judge of the same court to try the cause?—*State ex rel. Jenkins v. District Court et al.*, 595.

Change of Venue—Disqualification of Judge—Vacation of Order—Jurisdiction.

29. Under Code of Civil Procedure, section 180, as amended by Acts of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, providing that on the disqualification of a district judge by the filing of an affidavit provided for, his authority ceases except to arrange his calendar, invite in another judge, and change the venue

if the judge invited fails to come within thirty days, where a judge, on being disqualified, changed the venue to another county, a judge of a different department of the same court had no jurisdiction to hear a motion to annul such order changing the place of trial.—*State ex rel. Jenkins v. District Court et al.*, 595.

Change of Place of Trial—Notice.

30. Notice of motion for change of place of trial, under section 615 of the Code of Civil Procedure, as amended by Act of Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 8, is not required to be given to the adverse party.—*State ex rel. Jenkins v. District Court et al.*, 595.

DIVORCE.

Failure to Pay Alimony—Contempt—Supervisory Control.

1. An order made in a divorce suit restraining defendant from disposing of his property was so modified as to allow him to mortgage certain property in order to comply with an order of court awarding plaintiff alimony and counsel fees, and to pay certain debts. Defendant mortgaged the property, paid counsel fees and two months' alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses, failing thereafter to pay the alimony awarded. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in such an arbitrary or unlawful manner as to entitle defendant to a writ of supervisory control.—*State ex rel. Dougan v. District Court et al.*, 34.

Suit Money—Counsel Fees—Denial—Harmless Error.

2. Defendant in an action for divorce moved, before trial, for suit money and counsel fees; the application, however, was heard during its progress. No request for continuance was made on any ground. It appeared that she had spent about \$1,000 in preparing the case, and that she owed \$900 of this sum. She was represented by eminent counsel during the entire trial, and the record failed to show that she did not have all the witnesses she desired or all the information concerning plaintiff's witnesses necessary to conduct her defense successfully. *Held*, that under such circumstances, a denial of attorneys' fees and a refusal to allow more than \$200 suit money was not prejudicial error, if error at all.—*Bordeaux v. Bordeaux*, 159.

Condonation—Special Defense—Pleadings.

3. While, generally speaking, condonation in an action for divorce is a special defense not available unless pleaded, yet when, though not pleaded, the issue has been contested in the evidence without objection, and it clearly appears that the offense alleged in the complaint has been condoned, the divorce will be denied.—*Bordeaux v. Bordeaux*, 159.

Condonation—Evidence—Sufficiency.

4. In divorce, evidence considered, and *held* sufficient to show that the offense charged in the complaint, if committed, had been condoned.—*Bordeaux v. Bordeaux*, 159.

EASEMENTS.

Public Lands—Entry—Ditches.

1. Where lands have been withdrawn from the public domain by entry, and a ditch and its uses were a burden thereon by grant from the government at the time of the entry, such burden cannot be added to in favor of a third person under Act of Congress of July 26, 1866 (14 Stat. 251, chapter 262), giving citizens the privilege of running

a ditch over unoccupied government lands.—*Campbell v. Flannery et al.*, 119.

Parties to Action.

2. An easement claimed on lands in possession of defendants cannot be adjudged in a suit to which the owner is not a party.—*Campbell v. Flannery et al.*, 119.

EJECTMENT.

See *Mines*, 8.

ELECTION.

Conversion—Measure of Damages.

1. Under Civil Code, section 4333, providing for two measures of damages for the wrongful conversion of personal property, the party injured must elect under which of these two options he will claim, and he may not be permitted to rely upon both in the same case.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Conversion—Measure of Damages—Instructions.

2. Where a party in his complaint and by his evidence seeks to recover damages for the wrongful conversion of personal property under one of two measures granted by the statute, an instruction authorizing the assessment of damages according to the other standard is erroneous.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

ELECTIONS.

***Mandamus*—Governor—Certificate of Election—Affidavit—Insufficiency.**

1. An affidavit on application for writ of *mandamus* to the governor to issue a certificate of election to relator as one of the judges of a certain district held insufficient, where it merely alleged that the law provides for three judges in such district, that at the election there were six candidates, and that the relator, as one of the candidates, received the third highest number of votes, the court taking judicial notice of the fact that the governor's proclamation called for the election of two judges only in such district, and that three political party organizations had tickets in the field seeking the suffrages of the people for their respective candidates. Under such circumstances the presumption will not be indulged that the electors voted for more than two candidates for judgeships.—*State ex rel. Breen v. Toole, Governor*, 4.

Canvassing Officers—Powers.

2. *Obiter*: The powers of canvassing officers are neither judicial nor *quasi* judicial, their sole duty being to ascertain and declare the result of the election.—*State ex rel. Breen v. Toole, Governor*, 4.

***Mandamus*—Canvassing Officers—Evidence.**

3. *Obiter*: Courts in *mandamus* proceedings to compel the performance of the ministerial duties of canvassing officers cannot hear evidence touching the regularity or legality of any election and decide controversies touching these matters.—*State ex rel. Breen v. Toole, Governor*, 4.

General—Validity—Notice.

4. *Obiter*: To render a general election valid, the formalities of notice, etc., are not necessary.—*State ex rel. Breen v. Toole, Governor*, 4.

Special—Vacancies—Notice.

5. *Obiter*: It is only when special elections are held to fill vacancies, that the technicality of notice is essential.—*State ex rel. Breen v. Toole, Governor*, 4.

Board of Canvassers—Mandamus—Abatement.

6. *Mandamus* proceedings, instituted against the state treasurer and the attorney general, as a majority of the state board of canvassers, to compel them to reconvene and certify certain votes cast for the relator for the office of district judge, dismissed as abated, where prior to the hearing the terms of such officers had expired, so that they could not perform the mandate of the writ if issued, where their successors had not been given notice of the proceedings and where no demand had been made upon them to perform the duties the performance of which was sought by the writ.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

EQUALIZATION, BOARD OF.**County Board—Assessment—Increase—Notice.**

1. The giving of ten days' notice to the taxpayer is essential to confer upon a county board of equalization power to increase the assessed valuation of his property under section 3781 of the Political Code, or to correct such assessment under the provisions of section 3789 of the same code. In either case the ten days' notice is jurisdictional.—Montana Ore Pur. Co. v. Maher, 480.

Assessment—Increase—Notice—Waiver.

2. Failure by the county board of equalization to give a taxpayer the ten days' notice of an increase in his assessment required by statute, is not waived by his voluntary appearance before the board, after the raise had been made, for the purpose of seeking a reduction of the assessment.—Montana Ore Pur. Co. v. Maher, 480.

Final Action of Board—Record.

3. An entry on the minutes of the county board of equalization, after reciting errors in the returns made to the assessor by a taxpayer, directed that officer to make the proper correction in the assessment. The pleadings admitted that the board made the entry with respect to the assessment in the amount stated in the entry. *Held*, that no other changes or records being shown, a contention that final action was not taken in the matter until after the taxpayer's voluntary appearance before the board was without merit.—Montana Ore Pur. Co. v. Maher, 480.

Minute Entries—Parol Evidence.

4. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the proceedings had before the county board of equalization, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.—Montana Ore Pur. Co. v. Maher, 480.

Jurisdiction of Board—Affirmative Showing—Record.

5. As the county board of equalization, acting on assessments of property, is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear affirmatively from the record of its proceedings.—Montana Ore Pur. Co. v. Maher, 480.

Jurisdiction of Board—Notice—Minutes.

6. Where the minutes of the county board of equalization showed that it did not meet until July 20th, and that a raise in an assessment was made July 29th, and before any appearance on the part of the taxpayer affected thereby, it was apparent that the ten days' notice of the raise, required by statute, could not have been given, and the board was without jurisdiction in the matter.—Montana Ore Pur. Co. v. Maher, 480.

Decree—Payment of Taxes Admittedly Due—Condition Precedent.

7. Where the county board of equalization raised an assessment without giving the ten days' notice required by statute, a decree enjoining the county treasurer from selling the property to pay the taxes computed on the raised valuation, without requiring, as a condition precedent, the payment of the tax admitted by the taxpayer to be due, was erroneous.—*Montana Ore Pur. Co. v. Maher*, 480.

EQUITY.**Resulting Trusts—Equitable Title—When Property.**

1. An equitable title to land, which upon payment of a balance due on the purchase price will ripen into a legal title, is property, a resulting trust in which may be declared and enforced by a court of equity.—*Lynch v. Herrig*, 267.

Jurisdiction—Prevention of Fraud.

2. Equity has jurisdiction to prevent the consummation of a fraud.—*Lynch v. Herrig*, 267.

Supreme Court—Equity Cases—Review—Questions of Fact—Evidence.

3. Under Code of Civil Procedure, section 21, as amended by Act of 1903 (2d Extra. Session of 1903, page 7), authorizing the supreme court to review all questions of fact, in an equity case, arising on the evidence presented in the record, and determine the same, the appellant must show that the preponderance of the evidence is against the findings of the trial court before the supreme court will disturb such findings on the ground of insufficiency of the evidence.—*Finlen v. Heinze et al.*, 354.

Statutes—Constitutionality—Equity Cases—Review.

4. Section 21, Code of Civil Procedure, as amended by Act of 1903 (2d Extra. Session, page 7), requiring the supreme court to review in equity cases all questions of fact arising upon the record and determine the same, does not purport to impose on that court any additional original jurisdiction, and hence is not unconstitutional.—*Finlen v. Heinze et al.*, 354.

ESTOPPEL.**Water Rights—Pleadings—Agents—Unauthorized Representations.**

1. Where, in a suit to restrain interference with the flow of flood waters in certain ditches, it is not alleged that a codefendant, who *professed* to be authorized to sell the land, was the agent of the owner or empowered to make any representations for him, and the other defendants are not connected with his statements, they are not estopped to deny plaintiff's right to transmit waters through the ditches by representations of such codefendant, made before plaintiff's purchase, that the waters were carried through the ditches.—*Campbell v. Flannery et al.*, 119.

Mines—Injunction—Pleadings—Ownership of Premises.

2. Where, in an action for an injunction, the complaint alleged that defendants' use of mining premises was merely permissive, and that their right to such use was terminable at plaintiff's pleasure, the defendants, having failed to file any answer or pleading, are estopped to contend that plaintiff was not the owner of the premises.—*Clark v. Wall et al.*, 219.

Life Insurance—Nonpayment of Premiums—Waiver.

3. Premiums on a life insurance policy were payable quarterly on the 6th days of August, November, February and May. The policy provided that it should be void on assured's failure to pay premiums

as provided, and that forfeiture could only be waived or premiums in arrears received, by agreement in writing signed by an officer of the company. The insurer received and retained one premium paid two days after being due. *Held*, that by this single act of waiver the company did not estop itself to insist on a forfeiture when payment was made sixteen days after due date thereof, which payment was tendered back but refused.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Mines—Specific Performance.

4. Defendant is not estopped to claim that he succeeded to plaintiff's interests in a mine by contract with plaintiff, by reason of having brought suit in plaintiff's name, after the date of the contract, to enjoin a third person from working the mine, this having been under an arrangement with plaintiff, and he not having been misled thereby.—*Finlen v. Heinze et al.*, 354.

Mortgage—Assignment—Record.

5. Where an assignee of a mortgage recorded the assignment, and a purchaser of the mortgaged premises afterward paid the debt to the assignor, failure of the assignee to make claim to the ownership of the mortgage until two years after the assignment, and after the assignor had become insolvent, was not sufficient to estop the assignee from enforcing the security, nothing appearing to show that he failed to speak when he should, or that he actively or passively misled the defendants to their prejudice.—*Cornish v. Woolverton et al.*, 456.

EVICTIION.

See Landlord and Tenant, 2.

EVIDENCE.

Mandamus—Elections—Canvassing Officers.

1. *Obiter*: Courts in *mandamus* proceedings to compel the performance of the ministerial duties of canvassing officers cannot hear evidence touching the regularity of legality of any election and decide controversies touching these matters.—*State ex rel. Breen v. Toole, Governor*, 4.

Sales—Warranty—Jury.

2. In an action for the price of a stove alleged by defendant to be inferior to the warranty, testimony as to experiments by witness at cooking with the stove, and that the "things I tried to cook were not fit to eat, we couldn't eat them, I could not do anything with the stove," was not an invasion of the province of the jury as drawing conclusions from the evidence.—*Lander v. Sheehan*, 25.

Sales—Trademarks.

3. In an action for the price of a stove alleged by defendant to have been worthless, the admission of testimony of a third person that he had purchased a stove of plaintiff bearing the same trademark, which proved to be worthless, was error.—*Lander v. Sheehan*, 25.

Water Rights—Appropriation—Statutory Requirements.

4. In an action for damages for using the water of a certain river, and for an injunction to prevent interference with the alleged rights of plaintiff therein, evidence examined, and *held* to warrant a nonsuit for failure of the plaintiff to comply with the requirements of Compiled Statutes, fifth division, sections 1250, 1251, 1256 and 1257, in making his alleged appropriation, in that he never diverted the water claimed to have been appropriated, or constructed any dam, ditch, flume, or work of any kind to convey water to any place for a beneficial purpose, or owned the land described in his notice, or any mine,

mill, smelter, ranch or property to which the water right was appurtenant, and on which the water could be utilized.—*Miles v. Butte Electric & Power Co.*, 56.

Objections—Supreme Court—Appeal.

5. An objection to the admission of evidence raised for the first time in the supreme court will not be considered.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Wrongful Appointment—Supreme Court Opinion.

6. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of the supreme court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by the defendants.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Documentary—Admissibility.

7. An objection to a series of documents as a whole is not well taken if some of them are admissible.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Admissibility—Pleadings—Harmless Error.

8. The admission of evidence in proof of matters admitted by the pleadings is not reversible error.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Corporations—Books—Appeal.

9. Where the books and papers of a corporation were admitted in evidence without objection, it cannot be claimed on appeal that the admission of one of such papers constituted error.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Wrongful Appointment—Damages—Accounts.

10. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, plaintiff may show as an item of damage the amount of a good and collectible account which was lost by reason of the receivership.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Wrongful Appointment—Damages—Accounts.

11. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, evidence of the loss of an account through the receivership and the statute of limitations, is admissible, although no trial of the question in the courts had been had.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Wrongful Appointment—Malice—Probable Cause.

12. It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, to show that the appointment was procured maliciously and without probable cause.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

***Res Judicata*—Pleadings—Findings.**

13. Where plaintiff's equities have been presented under his complaint and in his evidence, and the defendant has failed to introduce any evidence, the trial court's finding that under the evidence plaintiff had not established his case, or had any equities, is *res judicata*, if the court's holding was correct.—*Campbell v. Flannery et al.*, 119.

Railroads—Killing Stock—Negligence.

14. In an action against a railroad company for killing cattle, the engineer testified that a curve in the track prevented his seeing the

cattle until he was about two hundred feet from them; that the train was running between forty-one and forty-two miles per hour, and was equipped with air-brakes, which were in first-class condition; that on seeing the cattle he made "an emergency application of the brakes" and gave the stock alarm; that he did all he could to prevent striking the cattle; that he stopped the train within six hundred feet; and that to stop within one thousand feet would be a good stop. *Held*, that this testimony being uncontradicted, and there being no evidence of negligence, a verdict for defendant should have been directed.—*Carman v. Mont. C. Ry. Co.*, 137.

Indefiniteness—Railroads—Killing Stock—Value—Judgment.

15. Where three of plaintiff's animals were killed and three were injured, testimony merely as to the value of the animals killed and injured, and failing to show clearly the damages sustained by reason of the injury to those not killed, is too indefinite on which to base a judgment.—*Carman v. Mont. C. Ry. Co.*, 137.

Expert Witnesses—Hypothetical Questions—Basis.

16. In asking a hypothetical question of an expert witness, the facts proven must be taken as the basis for the hypothesis.—*Carman v. Mont. C. Ry. Co.*, 137.

Divorce—Condonation—Sufficiency.

17. In divorce, evidence considered, and *held* sufficient to show that the offense charged in the complaint, if committed, had been condoned.—*Bordeaux v. Bordeaux*, 159.

Water Rights—Cross-examination.

18. Where a notice of appropriation of water filed by a party and testimony given by him are both before the court, it is not permissible to bring out, by a cross-examination of the party, discrepancies between his testimony and the contents of the notice.—*Norman v. Corbley*, 195.

Parol—Contracts—Consideration—Forbearance to Sue.

19. Parol evidence is admissible to show that the consideration for a written contract was forbearance to sue.—*Noyes v. Young et al.*, 226.

Action for Injuries—Negligence—Fellow-servant.

20. In an action for injuries to a servant evidence *held* insufficient to show that A, by whose alleged negligence plaintiff was injured, was acting for the defendant as a vice-principal, and not as plaintiff's fellow-servant.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Insurance—Forfeitures—Waiver.

21. The fact that an insurance company waived forfeitures of policies held by other persons is of no evidentiary value, where it is not shown that the holder of the policy in controversy knew of such waivers and that his conduct was influenced by such knowledge.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life Insurance—"Connected" with Sale of Liquors.

22. Where, in an action on a life insurance policy, the insurer claimed a breach of warranty that assured was not connected with the sale of spirituous liquors, evidence that the latter received no consideration for an occasional service rendered to a saloon-keeper at the bar, was of some materiality as tending to show the exact relation of the assured to the business.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Sales—Personal Property—Executory Agreement.

23. Evidence *held* insufficient, under Civil Code, section 1540, to show that an agreement to sell certain cattle amounted to an actual sale, so as to make the vendee, who prior to delivery promised to retain a part of the purchase price and pay it to a creditor of the vendor,

indebted to such creditor on account thereof.—*Adlam et al. v. McKnight*, 349.

Mines—Oral Agreement for Sale—Sufficiency—Specific Performance.

24. Evidence on a counterclaim for specific performance *held* sufficient to show a complete oral agreement for sale of interests in a mine.—*Finlen v. Heinze et al.*, 354.

Supreme Court—Equity Cases—Review—Questions of Fact.

25. Under Code of Civil Procedure, section 21, as amended by Act of 1903 (2d Extra. Session of 1903, page 7), authorizing the supreme court to review all questions of fact, in an equity case, arising on the evidence presented in the record, and determine the same, the appellant must show that the preponderance of the evidence is against the findings of the trial court before the supreme court will disturb such findings on the ground of insufficiency of the evidence.—*Finlen v. Heinze et al.* 354.

District Courts—Specific Performance.

26. The district court, in an action to enforce specific performance of an oral agreement for the sale of real property, should weigh the evidence adduced in the light of the circumstances surrounding the transaction, and particularly with reference to the reasonableness or unreasonableness of the respective statements made by the principal actors in the case.—*Finlen v. Heinze et al.*, 354.

Impeaching Witness—Exclusion—Harmless Error.

27. Error in excluding evidence tending to impeach a witness for the defendant, seeking to enforce specific performance of an oral agreement for the sale of mining property, is harmless where, excluding this testimony, there is a clear preponderance of the evidence in favor of the findings for defendant.—*Finlen v. Heinze et al.*, 354.

Mining Corporations—Money Advanced—Recovery.

28. In an action against a mining corporation to recover money alleged to have been advanced by him, as general manager of the company, in payment of services of certain employees of defendant, with the understanding that he be reimbursed from the proceeds of certain concentrates turned over to the secretary of the corporation, plaintiff was not entitled to recover in the absence of evidence showing that the concentrates were sold and a sum sufficient to reimburse him received therefrom.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Liability—Directors.

29. Evidence that three directors of a mining corporation acknowledged the justness of a claim against the corporation, and agreed that it should be paid, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity, does not establish an obligation against the corporation.—*Farrell v. Gold Flint Min. Co.*, 416.

Criminal Law—Challenge to Panel.

30. Penal Code, section 2038, provides that, where a challenge to the panel is denied, the court must proceed to try the question of fact. *Held*, that where defendant's offer to submit such a challenge on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Presumptions.

31. In prosecutions for rape, evidence of previous good character of defendant is never conclusive, as a matter of law, in favor of defendant, and does not of itself raise a presumption in his favor.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Purpose.

32. In a prosecution for rape, evidence of defendant's previous good character is evidence which the jury should consider, together with all the other evidence in the case in determining whether or not the accused is guilty beyond a reasonable doubt.—*State v. Jones*, 442.

Jurors—Witnesses—Credibility—Appeal.

33. The jurors are the judges of the credibility of witnesses and of the weight to be given the testimony, and the supreme court, on appeal from judgment of conviction for the crime of rape, may not weigh the evidence and say that it does not prove that which it tends to prove, or that particular evidence does prove particular facts.—*State v. Jones*, 442.

Rape—Testimony of Prosecutrix—When Sufficient to Convict.

34. In a prosecution for rape, where the jury believe the testimony of prosecutrix, no additional evidence is necessary to support a verdict of guilty.—*State v. Jones*, 442.

Mortgage—Evidence of Debt—When.

35. In the absence of any written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment.—*Cornish v. Woolverton et al.*, 456.

Equalization Board—Minute Entries—Parol.

36. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the proceedings had before the county board of equalization, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.—*Montana Ore Pur. Co. v. Maher*, 480.

Extrinsic—Deeds—Water Rights—Appurtenances.

37. Where a deed to certain land does not specify the particular appurtenant water right alleged to have been conveyed by it, extrinsic evidence may be resorted to to establish such right.—*Bullerdick v. Hermsmeyer et al.*, 541.

Water Rights—Adverse Use.

38. In a suit to determine water rights of the owners of certain land, evidence held insufficient to support a finding that plaintiff had acquired a right to the use of all of the waters of the stream by adverse use since 1888.—*Bullerdick v. Hermsmeyer et al.*, 541.

Contracts—Breach—Prejudice.

39. Where, in an action for breach of contract to purchase certain milk the court sustained an objection to a question asked of one of defendants' employees whether there was any effort on defendants' part, or anyone acting under him, to break the contract, the fact that before a ruling on the question was finally made the witness stated that he did not want to answer the question unless he had to, that he was in the confidence of the defendants, and did not want to be placed in the position of telling what happened and what did not happen, the question thus remaining unanswered, was not reversible error.—*Brazell v. Cohn et al.*, 556.

Opinion Evidence—Knowledge of Witness—Competency.

40. Plaintiff testified, in an action in claim and delivery to recover furniture wrongfully seized by her landlord to satisfy a claim for rent, that she purchased most of it from a prior lessee, about fourteen months before the seizure, for \$1,600, and had added to it new furniture to the amount of \$400; that she knew the value of the furniture, and that it was worth \$2,000; that she had once before purchased similar property; that none of it had deteriorated appreciably by use, and that it was still worth the purchase price to any

one desiring to buy such property, whether in the leased house or not. *Held*, that the knowledge and experience thus evinced by her was sufficient to permit her to state her opinion.—*Osmer v. Furey et al.*, 581.

EXCEPTIONS.

Implied Findings—Request—Appeal.

1. Under the doctrine of implied findings, a judgment will not be reversed for want of findings, unless the party aggrieved shall have requested them in writing, caused such request to be entered in the minutes of the court, and made and saved exceptions to the action of the court, in accordance with the requirements of section 1114 of the Code of Civil Procedure.—*Bordeaux v. Bordeaux*, 159.

Criminal Law—Jurors—Implied Bias—Challenges.

2. Under Penal Code, section 2170, an exception is allowed to the action of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias.—*State v. Jones*, 442.

EXCUSABLE NEGLECT.

See Default, 1.

EXECUTORS.

See, also, Administrators.

Wrongful Procurement of Receiver—Survival of Action.

1. Under Code of Civil Procedure, section 2733, a cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of the decedent wrongdoer.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

EXPERT WITNESSES.

See Evidence, 16.

"FAIR TRIAL BILL."

See District Courts, 13, 14, 16, 18, 27, 28, 29, 30.

FELLOW-SERVANTS.

Special Defense—Pleadings.

1. *Quære*: Is the defense of negligence of a fellow-servant in an action for damages for injury of person, a special defense which must be pleaded?—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Evidence—Vice-principal.

2. In an action for injuries to a servant, evidence, *held* insufficient to show that A, by whose alleged negligence plaintiff was injured, was acting for the defendant as a vice-principal, and not as plaintiff's fellow-servant.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

FINDINGS.

Res Judicata—Pleadings—Evidence.

1. Where plaintiff's equities have been presented under his complaint and in his evidence, and the defendant has failed to introduce any evidence, the trial court's finding that under the evidence plaintiff had not established his case, or had any equities, is *res judicata*, if the court's holding was correct.—*Campbell v. Flannery et al.*, 119.

Implied—Request—Exceptions—Appeal.

2. Under the doctrine of implied findings, a judgment will not be reversed for want of findings, unless the party aggrieved shall have

requested them in writing, caused such request to be entered in the minutes of the court, and made and saved exceptions to the action of the court, in accordance with the requirements of section 1114 of the Code of Civil Procedure.—*Bordeaux v. Bordeaux*, 159.

Appeal—Supplemental Transcript—Certificate.

3. A supplemental transcript containing findings rejected by the trial court, which formed no part of the judgment-roll, or of the statement on motion for new trial, or of any bill of exceptions settled by the court, authenticated only by a certificate of the clerk, will be disregarded on appeal.—*Bordeaux v. Bordeaux*, 159.

Supreme Court—Will Make Its Own Conclusions—When.

4. Under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), making it the duty of the supreme court to determine questions of fact, unless for a good reason a new trial or the taking of other evidence in the district court be ordered, the supreme court will hesitate to overturn findings based on substantially conflicting evidence which would justify an inference in favor of either party; but where the conflict is trifling or unsubstantial, or where the evidence preponderates decidedly against the findings, the supreme court may examine the facts, make up its own conclusion, and declare upon the rights involved accordingly.—*Bordeaux v. Bordeaux*, 159.

Implied—Claim and Delivery—Verdict.

5. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action.—*McGregor v. Lang*, 568.

FIRE INSURANCE.

See Insurance.

FORBEARANCE TO SUE.

See Contracts, 10, 11, 12.

FORFEITURES.

See Insurance, 2, 9, 10, 11.

FRAUD.

Prevention of—Equity—Jurisdiction.

1. Equity has jurisdiction to prevent the consummation of a fraud.—*Lynch v. Herrig*, 267.

HABEAS CORPUS.

Object of Writ.

1. The only object sought, and the only relief that can be granted, in *habeas corpus* proceedings, is the release of the complainant from unlawful custody.—*State ex rel. City of Butte et al. v. District Court et al.*, 18.

District Courts—For what Purpose Writ may not be Used.

2. The district court may not use the writ of *habeas corpus* for the purpose of reviewing the action of a committing magistrate in applying a deposit, in lieu of bail, to the payment of a fine assessed against complainant; nor has it jurisdiction to determine, under the writ, who is entitled to the money, or direct the city treasurer, to whom it had been paid, to refund it to complainant.—*State ex rel. City of Butte et al. v. District Court et al.*, 18.

Authority of Sheriff.

3. Where petitioner in *habeas corpus* is legally in custody, it is immaterial when the officer got his authority to hold him, if he obtained it before he made return, and the authority appears in the return.—In re Dye, 132.

Oral Judgment—Judgment *Nunc Pro Tunc*—Special Terms.

4. Under Penal Code, section 2753, providing that the court, if the time during which a party may be legally detained in custody has not expired, must remand him if he is detained in custody under final judgment of any competent court of criminal jurisdiction, or of any process issued on such judgment, where a petitioner for *habeas corpus* was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge.—In re Dye, 132.

HARMLESS ERROR.**Evidence—Admissibility—Pleadings.**

1. The admission of evidence in proof of matters admitted by the pleadings is not reversible error.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Conversion—Conflicting Instructions—Measure of Damages.

2. The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided for under Civil Code, section 4333, only one of which options could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Instructions—Names of Attorneys Subscribed.

3. The giving of instructions bearing the names of the attorneys of the parties, while not a commendable practice, is not reversible error.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Divorce—Suit Money—Counsel Fees—Denial.

4. Defendant in an action for divorce moved, before trial, for suit money and counsel fees; the application, however, was heard during its progress. No request for continuance was made on any ground. It appeared that she had spent about \$1,000 in preparing the case, and that she owed \$900 of this sum. She was represented by eminent counsel during the entire trial, and the record failed to show that she did not have all the witnesses she desired or all the information concerning plaintiff's witnesses necessary to conduct her defense successfully. *Held*, that under such circumstances, a denial of attorneys' fees and a refusal to allow more than \$200 suit money was not prejudicial error, if error at all.—Bordeaux v. Bordeaux, 159.

Impeaching Witness—Evidence—Exclusion.

5. Error in excluding evidence tending to impeach a witness for the defendant, seeking to enforce specific performance of an oral agreement for the sale of mining property, is harmless where, excluding this testimony, there is a clear preponderance of the evidence in favor of the findings for defendant.—Finlen v. Heinze et al., 354

Criminal Law—Conflicting Instructions.

6. Where, in a criminal prosecution, an instruction correctly stating the law is in conflict with an erroneous one in defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two.—*State v. Jones*, 442.

HEARINGS.**What Constitutes a "Hearing."**

1. A "hearing" includes the trial of the case, a hearing on a motion, or a hearing in a proceeding of any character.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

HOMESTEADS.**Probate Courts—Apportionment—Petition.**

1. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, it was immaterial whether it acted on petition or on its own motion.—*Bullerdick v. Hermameyer et al.*, 541.

Apportionment—Conveyance—Appurtenances—Water Rights.

2. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, she had a right to convey the same, and her grantee became vested with the fee and such conveyance vested him with whatever right she had to the use of water appurtenant thereto, together with the means of using same.—*Bullerdick v. Hermameyer et al.*, 541.

HYPOTHETICAL QUESTIONS.

See Evidence, 16.

IDENTIFICATION.

See Sales, 7.

INADVERTENCE.

See District Courts, 3, 4, 5; Default, 1.

INDORSEMENT.

See Bills and Notes, 4.

INFORMATION.

See Criminal Law, 2, 3.

INJUNCTIONS.**Pleadings—Tenants in Common—Waste.**

1. (On motion for rehearing.) Where, in a suit to restrain interference with certain ditches, the complaint does not allege that defendants are tenants in common with plaintiff, but its theory is that defendants neither have nor claim any interest in the premises, defendants cannot be enjoined from cutting or damming the ditches on the theory that they are tenants in common, and, as such, cannot lawfully commit waste.—*Campbell v. Flannery et al.*, 119.

Mines—Pleadings—Estoppel—Ownership of Premises.

2. Where, in an action for an injunction, the complaint alleged that defendants' use of mining premises was merely permissive, and that their right to such use was terminable at plaintiff's pleasure, the defendants, having failed to file any answer or pleading, are estopped

to contend that plaintiff was not the owner of the premises.—Clark v. Wall et al., 219.

When Proper—Mines—Licenses.

3. Where a license to extract ores from a mining claim was revoked, and the licensees, who were insolvent and unable to respond in damages, nevertheless refused to surrender possession of the claim, and continued and threatened to continue the mining of the ore, thereby destroying the substance of the licensor's estate in the claim, the latter was entitled to an injunction restraining the further continuance by the licensees of their wrongful acts.—Clark v. Wall et al., 219.

Accounting—Complaint—Receivers.

4. *Obiter*: Where the complaint in an action for an accounting fails to state a cause of action, the ancillary relief of injunction or the appointment of a receiver will be denied.—Benepe-Owenhouse Co. v. Scheidegger, 424.

Action on Bond—Complaint—Insufficiency.

5. A complaint in an action on an injunction bond is fatally defective where it fails to state that the damages claimed by plaintiffs have not been paid.—Beebe et al. v. Jackson et al., 217.

Board of Equalization—Assessment—Increase.

6. *Held*, that where the county board of equalization made an increase in an assessment without giving the statutory notice of ten days to the person affected thereby, such notice being jurisdictional, and omission to give it not being a mere irregularity subject to explanation, injunction will lie to restrain the collection of taxes computed on the raised valuation.—Montana Ore Pur. Co. v. Maher, 480.

INSTRUCTIONS.

See, also, Conversion, 2, 3; Sales, 4.

Sales—Seller's Praise—Warranty—Opinion.

1. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by which the salesman indulged in an expression of opinion concerning the merits of the stove, does not constitute a warranty, and it is for the jury to determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the stove was made as one of fact or of mere opinion.—Lander v. Sheehan, 25.

Sales—Breach of Warranty—Measure of Damages.

2. Where the defense in an action for the price of a stove is framed so as to give defendant the benefit of section 4314 of the Code of Civil Procedure, in relation to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages, under section 4313, for the breach of warranty of the quality of the articles sold.—Lander v. Sheehan, 25.

Jury must Obey.

3. The jury must obey the instructions of the court, whether correct or not.—Lander v. Sheehan, 25.

Pleadings—Evidence.

4. Instructions must be warranted by the pleadings and evidence.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Names of Attorneys Subscribed—Harmless Error.

5. The giving of instructions bearing the names of the attorneys

of the parties, while not a commendable practice, is not reversible error.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Contracts—Consideration—Forbearance to Sue.

6. Where a sister of a decedent makes a claim in behalf of the decedent's estate, and her right to recover was disputed by the alleged debtor, the settlement of the claim, or the agreement to forbear suing thereon, was a sufficient consideration, for the execution of a contract between the sister and the alleged debtor, and in an action thereon it was not necessary to determine whether the sister, decedent's father and mother surviving, could have successfully maintained the claim against the alleged debtor, and an instruction to that effect was properly refused.—*Noyes v. Young et al.*, 226,

Request for Additional—Appeal.

7. Where the instructions of the court fairly cover the case, and are correct, the judgment will not be reversed because all the phases of the case are not covered by them, where no additional instructions covering the particular point are requested.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Rape—Erroneous Instruction—Previous Good Character of Defendant.

8. In a prosecution for rape, to instruct that evidence of previous good character is conclusive in favor of defendant, and that it raises a presumption in his favor, is for the court to invade the province of the jury, and determine the weight or effect to be given to particular evidence.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant—Correct Instruction.

9. In a prosecution for rape, an instruction that if, from a consideration of the evidence, the jury believed defendant guilty beyond a reasonable doubt, they should so declare, notwithstanding they might be satisfied that prior to committing the offense of which he was accused defendant was a man of good reputation and character, was correct.—*State v. Jones*, 442.

Conflicting—Criminal Law—Harmless Error—When.

10. Where, in a criminal prosecution, an instruction correctly stating the law is in conflict with an erroneous one in defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two.—*State v. Jones*, 442.

Instructions—Witnesses—Calling Attention to Particular Testimony.

11. An instruction calling attention to the testimony of one particular witness, singling her out from the other witnesses, is erroneous.—*State v. Jones*, 442.

Theory of Case—Appeal.

12. Where a cause was tried in the district court as one at law, a general verdict had and a judgment entered for plaintiff, he, on defendant's appeal, cannot change his ground in the supreme court and insist that the cause was one in equity, and that therefore error in giving or refusing instructions is not ground for reversal.—*Ayotte v. Nadeau*, 498.

Contracts.

13. In an action for breach of contract, a requested instruction that the jury, in fixing damages for nonperformance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance of the contract, was vague and indefinite, and not authorized by Civil Code, section 4301, providing that no damages can be recovered for breach of contract which are

not clearly ascertainable in both their nature and origin.—*Brazell v. Cohn et al.*, 556.

When Appellant may not Complain.

14. Where instructions, taken as a whole, fairly state the law applicable to a case, appellant has no cause to complain.—*Osmers v. Furey et al.*, 581.

INSURANCE.

Fire—Damages—Interest—Subrogation.

1. The right to recover damages for the negligent destruction of property by fire, together with interest recoverable in the discretion of the jury under Civil Code, section 4281, is assignable under Civil Code, section 1351, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed.—*Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 46.

Life—Assured "Connected" with Sale of Liquors—Forfeiture.

2. Where, in an action to recover the amount of an insurance policy, it appeared that the assured had represented in his application for the policy that he was not in any way connected with the manufacture or sale of spirituous liquors, the word "connected" must be presumed to have been used in its popular sense (section 2209, Civil Code), involving the idea of permanency; so that proof that assured occasionally waited on the customers of a saloon-keeper, for the latter's accommodation and without compensation—the assured having no interest whatever in the saloon—did not establish such connection with the business as to make his negative statement in the application a misrepresentation which would work a forfeiture of the policy.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Materiality of Representations Claimed to be False.

3. *Obiter*: The materiality of representations, made by the assured in an application for a life insurance policy, claimed by the insurer to be false, and the question whether the applicant acted in good faith, are of no importance—they being determined by the stipulations in the contract, and their truth or falsity made determinative of the rights of the parties.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Acts of Agent—Liability of Insurer.

4. *Obiter*: Where, by the terms of a life insurance policy, the statements contained in the application are made a part of it as conditions precedent, and the assurer assumes the risk only on the faith that they are true, the latter does not become liable where the agent or solicitor knows that the representations made are not true, when under the terms of the contract he has no authority to waive any requirement in this regard made by the principal.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Premiums—Nonpayment—Waiver.

5. Where a life insurance policy provided that any forfeiture for nonpayment of a premium could be waived only by a writing signed by an officer of the insurance company, an agreement between the assured and the company's local agent that quarterly premiums due on the 6th of certain months could be paid as late as the 22d of such months, was not within the apparent scope of the agent's authority and therefore not binding on the company.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Contents of Policy—Presumptions.

6. The assured is presumed to know, and it is his duty to read, the
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contents of a policy and all conditions and limitations therein contained.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Acts of Agent—Ratification—Presumptions.

7. Under a contract of insurance which provided that none of its conditions could be varied or modified by an agent except by agreement in writing signed by an officer of the insurance company, the assured is presumed to know that any engagements he may enter into with the agent are not binding upon the company unless brought home to and ratified by it.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Agents—Misrepresentations—Ratification.

8. A misrepresentation by the local agent of an insurance company to it as to the date of payment of a premium, prevented any ratification of the agent's act in receiving it and any waiver by the company.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Retention of Premium—Ratification—Presumptions.

9. By retaining a premium paid on a life insurance policy two days after it was due, an insurance company is conclusively presumed to have ratified the act of its local agent in receiving it and to have waived a forfeiture of the policy for a noncompliance with its provisions in this regard.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Nonpayment of Premiums—Waiver—Estoppel—Forfeiture.

10. Premiums on a life insurance policy were payable quarterly on the 6th days of August, November, February and May. The policy provided that it should be void on assured's failure to pay premiums as provided, and that forfeiture could only be waived or premiums in arrears received, by agreement in writing signed by an officer of the company. The insurer received and retained one premium paid two days after being due. *Held*, that by this single act of waiver the company did not estop itself to insist on a forfeiture when payment was made sixteen days after due date thereof, which payment was tendered back but refused.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Forfeitures—Waiver—Evidence.

11. The fact that an insurance company waived forfeitures of policies held by other persons is of no evidentiary value, where it is not shown that the holder of the policy in controversy knew of such waivers and that his conduct was influenced by such knowledge.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—Premiums Past Due—Assured in *extremis*—Concealment.

12. In an action to recover the amount of a life insurance policy, the concealment from the insurer of the fact that the assured was already in *extremis* when a premium past due was offered in payment, was fraudulent, fair dealing requiring that the assured apprise the company of his condition, so that it might intelligently exercise its option in the premises.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life—"Connected" with Sale of Liquors—Evidence.

13. Where, in an action on a life insurance policy, the insurer claimed a breach of warranty that assured was not connected with the sale of spirituous liquors, evidence that the latter received no consideration for an occasional service rendered to a saloon-keeper at the bar, was of some materiality as tending to show the exact relation of the assured to the business.—*Collins v. Metropolitan Life Ins. Co.*, 329.

INTEREST.

See, also, Insurance, 1.

On Purchase Price—Specific Performance.

1. Where plaintiff gave defendant an option to buy a mine, but, before the payments agreed upon became due, denied the existence

of the contract and sued to recover the property, he was not entitled (section 4280, Civil Code) to interest on the purchase money, on specific performance being decreed against him, for the reason that he himself prevented defendant from making the payments.—Finlen v. Heinze et al., 354.

Mortgage—Collection—Agency.

2. The mere fact that a person acted as the agent of the owner of a mortgage in collecting interest and delivering the canceled coupons, is not sufficient to show authority to collect the principal and discharge the mortgage.—Cornish v. Woolverton et al., 456.

JUDICIAL NOTICE.

Supreme Court—Proclamation of Governor—Political History of State.

1. Under Code of Civil Procedure, section 3150, the court will take judicial notice of the contents of the proclamation of the governor calling an election, and of the political history of the state.—State ex rel. Breen v. Toole, Governor, 4.

Supreme Court—State Officers—Mandamus—Terms of Office.

2. The supreme court will take judicial notice of the fact that on a certain date the persons sought to be coerced into action by *mandamus* were no longer state treasurer and attorney general, respectively, and that their successors had been elected, qualified and inducted into office.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

JURISDICTION.

See, also, Supreme Court, 3; Probate Courts, 3, 4, 5.

Pleadings—Supreme Court.

1. Under Code of Civil Procedure, section 685, providing that objections, except only the objection to jurisdiction of the court, are waived if not taken by demurrer or answer, the question of jurisdiction may be raised for the first time in the supreme court.—Oppenheimer v. Regan, 110.

Justices of the Peace—Sheriff—Nonperformance of Duty.

2. Code of Civil Procedure, section 66, subdivision 1, does not clothe justice of the peace courts with jurisdiction to entertain an action brought against a sheriff for damages for nonperformance of an official duty and to recover a penalty imposed by law for its nonperformance, such an action not being one arising on contract.—Oppenheimer v. Regan, 110.

Justices of the Peace—Limitations.

3. *Quære*: Is an action for the recovery of a sum of money which, with statutory penalty and interest at the legal rate, exceeds the statutory limit of \$300, without the jurisdiction of a justice of the peace?—Oppenheimer v. Regan, 110.

District Courts—Departments—Rules.

4. The several departments of a district court, presided over by different judges, constitute but one court, and the assignment of any portion of the business, by virtue of its rules, to any department, still leaves it pending in the district court, and jurisdiction is not lost by the fact that it may theretofore have been pending in another department or before another judge.—State ex rel. Nissler et al. v. Donlan et al., 256.

Supreme Court—Statutes—Constitutionality—Equity Cases—Review.

5. Section 21, Code of Civil Procedure, as amended by Act of 1903 (2d Extra. Session, page 7), requiring the supreme court to review in equity cases all questions of fact arising upon the record and de-

termine the same, does not purport to impose on that court any additional original jurisdiction, and hence is not unconstitutional.—*Finlen v. Heinze et al.*, 354.

Of Board of Equalization—Affirmative Showing—Record.

6. As the county board of equalization, acting on assessments of property is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear affirmatively from the record of its proceedings.—*Montana Ore Pur. Co. v. Maher*, 480.

Of Board of Equalization—Notice—Minutes.

7. Where the minutes of the county board of equalization showed that it did not meet until July 20th, and that a raise in an assessment was made July 29th, and before any appearance on the part of the taxpayer affected thereby, it was apparent that the ten days' notice of the raise required by statute, could not have been given, and the board was without jurisdiction in the matter.—*Montana Ore Pur. Co. v. Maher*, 480.

Of Board of Equalization—Assessment—Increase—Injunction.

8. *Held*, that where the county board of equalization made an increase in an assessment without giving the statutory notice of ten days to the person affected thereby, such notice being jurisdictional, and omission to give it not being a mere irregularity subject to explanation, injunction will lie to restrain the collection of taxes computed on the raised valuation.—*Montana Ore Pur. Co. v. Maher*, 480.

Water Rights—What may Constitute an Original Appropriation.

9. Where the owner of certain land had used water from a main irrigation ditch through a lateral from the date it was decreed to her by the probate court, such use constituted an original appropriation, though such decree was void for want of jurisdiction.—*Bullerdick v. Hermismeyer et al.*, 541.

JUDGMENTS.

See, also, *Res Judicata*.

Amendment After Entry—Appealable Order.

1. An order amending a judgment already entered is a special order after final judgment, and therefore appealable under Code of Civil Procedure, section 1722, as amended by Act of 1899 (Session Laws 1899, p. 146).—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. District Court*, 20.

Appeal—Affirmance—District Courts—Reopening Case.

2. When, upon appeal to the supreme court, a judgment of the district court has been reviewed and affirmed, or a specific judgment ordered to be entered in the case, it becomes final, and the district court cannot then proceed to reopen the case and allow new issues to be framed to try rights already settled, or amend or modify the judgment of the supreme court so as to enlarge or narrow its scope.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. District Court*, 20.

District Courts—Order Taxing Costs—Omission of Item—Remedy.

3. After an allowance by the district court for necessary costs and disbursements has been made to a party, and a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omission corrected, or an appeal from the judgment to have the error thus committed reviewed, otherwise he becomes bound by the judgment.—*State ex rel. Boston & Mont. C. C. & S. M. Co. v. District Court*, 20.

Satisfaction—Review on Appeal.

4. When a judgment has been paid, it ceases to be reviewable on appeal.—*In re Black's Estate*, 51.

Railroads—Killing Stock—Value—Evidence—Indefiniteness.

5. Where three of plaintiff's animals were killed and three were injured, testimony merely as to the value of the animals killed and injured, and failing to show clearly the damages sustained by reason of the injury to those not killed, is too indefinite on which to base a judgment.—*Carman v. Mont. C. Ry. Co.*, 137.

Default—Vacation—Inadvertence—Excusable Neglect.

6. After *remittitur* from the supreme court had been filed, plaintiff filed an amended complaint, which was served on the stenographer of defendant's attorneys during their absence, and, upon defendant's failure to answer, judgment was rendered by default. Immediately on defendant's acquiring knowledge thereof, it obtained a stay of execution, presented a motion to set aside the default, and for leave to answer, alleging that by the negligence of the stenographer the amended complaint had been lost, and had never been called to the attention of its attorneys. One of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the *remittitur*, but the clerk had failed to do so, and, though such attorney met plaintiff's attorney nearly every day, he had never referred to the filing of such amended complaint. *Held*, that such facts, with a proposed answer, which put in issue all the material allegations of the amended complaint, entitled defendant to a vacation of the default judgment, under Code of Civil Procedure, section 774, authorizing the court to relieve a party, in its discretion, from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and that the court erred in overruling the motion.—*Greene v. Montana Brewing Co.*, 102.

Oral—Habeas Corpus—Nunc Pro Tunc—Special Terms.

7. Under Penal Code, section 2753, providing that the court, if the time during which a party may be legally detained in custody has not expired, must remand him if he is detained in custody under final judgment of any competent court of criminal jurisdiction, or of any process issued on such judgment, where a petitioner for *habeas corpus* was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge.—*In re Dye*, 132.

Final—Nonappealable Orders—Justices of the Peace.

8. An order of the district court, overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be appealable under Code of Civil Procedure, section 1722, as amended by the Act of 1899 (Session Laws of 1899, p. 146).—*Raymond v. Raymond et al.*, 170.

"Final Judgment"—Statutes—Justices of the Peace.

9. The "final judgment" referred to in section 1722 of the Code of Civil Procedure as amended (Session Laws of 1899, p. 146), is a judgment rendered by the district court and not that rendered by a justice of the peace from which an appeal is prosecuted.—*Raymond v. Raymond et al.*, 170.

On Pleadings—Complaint—Denials—Proof.

10. Where denials contained in the answer required proof on the part of the plaintiff as to some of the material allegations of his complaint, plaintiff's motion for judgment on the pleadings was properly overruled.—*Norman v. Corbley*, 195.

Appeal from Justice's Court—Failure to Demand—Dismissal of Case.

11. Where more than six months had elapsed after an order made sustaining a motion to dismiss an appeal from a justice's court, and respondent had neglected to demand and have entered a judgment in accordance with such ruling, as required by Code of Civil Procedure, section 1004, subdivision 6, it was error to deny a motion to dismiss the case and to render judgment dismissing the appeal.—*Franzman v. Davies et al.*, 251.

How to be Plead.

12. Under Code of Civil Procedure, section 745, providing that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceeding then pending in that court, under the provisions of the Bankruptcy Act of July 1, 1898, was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made."—*Mears v. Shaw*, 575.

JURY.

See, also, Evidence, 2.

Must Obey Instructions.

1. The jury must obey the instructions of the court, whether correct or not.—*Lander v. Sheehan*, 25.

Maps—Papers—Taking to Jury-room.

2. Under Code of Civil Procedure, section 1083, providing that on retiring for deliberation the jury may take with them all papers which have been received in evidence, it was not error, in an action against a railroad company for killing cattle on the track, to refuse to allow the jury to take with them a map of the place where the accident occurred, which was not admitted in evidence, but only used by the witnesses while testifying in explaining their testimony.—*Carman v. Mont. C. Ry. Co.*, 137.

Sales—Personal Property—Intention—Question of Fact.

3. The intention of the parties to a contract of sale of personal property is one of fact, to be determined by the jury under proper instructions of the court.—*Adlam et al. v. McKnight*, 349.

Criminal Law—Challenge—Burden of Proof.

4. In a criminal prosecution the burden of the proof on the trial of a challenge to the array was on the defendant interposing it.—*State v. Jones*, 442.

Criminal Law—Challenge to Panel—Evidence.

5. Penal Code, section 2038, provides that, where a challenge to the panel is denied, the court must proceed to try the question of fact. Held, that where defendant's offer to submit such a challenge on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied.—*State v. Jones*, 442.

Criminal Law—Jurors—Implied Bias—Challenges—Exceptions.

6. Under Penal Code, section 2170, an exception is allowed to the

action of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias.—State v. Jones, 442.

Rape—Previous Good Character of Defendant—Purpose.

7. In a prosecution for rape, evidence of defendant's previous good character is evidence which the jury should consider, together with all the other evidence in the case in determining whether or not the accused is guilty beyond a reasonable doubt.—State v. Jones, 442.

Jurors—Witnesses—Credibility—Appeal—Evidence.

8. The jurors are the judges of the credibility of witnesses and of the weight to be given the testimony, and the supreme court, on appeal from judgment of conviction for the crime of rape, may not weigh the evidence and say that it does not prove that which it tends to prove, or that particular evidence does prove particular facts.—State v. Jones, 442.

JUSTICES OF THE PEACE.

Jurisdiction—Appeal—District Courts.

1. Where a justice of the peace had no jurisdiction of the subject matter of an action, the district court could acquire none by appeal.—Oppenheimer v. Regan, 110.

Jurisdiction—Sheriff—Nonperformance of Duty.

2. Code of Civil Procedure, section 66, subdivision 1, does not clothe justice of the peace courts with jurisdiction to entertain an action brought against a sheriff for damages for nonperformance of an official duty and to recover a penalty imposed by law for its nonperformance, such an action not being one arising on contract.—Oppenheimer v. Regan, 110.

Jurisdiction—Limitations.

3. *Quære*: Is an action for the recovery of a sum of money which, with statutory penalty and interest at the legal rate, exceeds the statutory limit of \$300, without the jurisdiction of a justice of the peace?—Oppenheimer v. Regan, 110.

Nonappealable Orders—Final Judgment.

4. An order of the district court, overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be appealable under Code of Civil Procedure, section 1722, as amended by the Act of 1899 (Session Laws of 1899, p. 146).—Raymond v. Raymond et al., 170.

"Final Judgment"—Statutes.

5. The "final judgment" referred to in section 1722 of the Code of Civil Procedure as amended (Session Laws of 1899, p. 146), is a judgment rendered by the district court and not that rendered by a justice of the peace from which an appeal is prosecuted.—Raymond v. Raymond et al., 170.

Appeal—Dismissal—Nonappealable Order.

6. An order sustaining a motion to dismiss an appeal from a justice's court is not appealable. (Session Laws of 1899, p. 146).—Franzman v. Davies et al., 251.

Appeal—Failure to Demand Judgment—Dismissal of Case.

7. Where more than six months had elapsed after an order made sustaining a motion to dismiss an appeal from a justice's court, and respondent had neglected to demand and have entered a judgment in accordance with such ruling, as required by Code of Civil Procedure, section 1004, subdivision 6, it was error to deny a motion to dismiss the case and to render judgment dismissing the appeal.—Franzman v. Davies et al., 251.

LANDLORD AND TENANT.

Actual and Constructive Eviction—Justification—Abandonment.

1. Where defendant entered on premises, leased by him to plaintiff, and proceeded to build an addition to the rear of the building without consulting the lessee, in the course of which operations the steps from the rear into the house were removed, thereby preventing access from the back yard, and a chimney used by lodgers in the basement destroyed, compelling them to seek lodging elsewhere, while other lodgers left the premises by reason of the noise incident to the work, the plaintiff, having been actually evicted from a part of the premises and constructively from the rest by defendant's action, was justified in abandoning the building, and discharged from any obligation to pay rent for the remainder of the term.—*Osmers v. Furey et al.*, 581.

Eviction—Defense to Action for Rent.

2. Eviction by the landlord is a complete defense to an action for rent, the consideration for the agreement having failed by the wrongful act of the landlord in depriving the tenant of the beneficial use of the property.—*Osmers v. Furey et al.*, 581.

Claim and Delivery—Order of Proof—Justification—Rebuttal.

3. In an action in claim and delivery for furniture of plaintiff seized by defendant under an alleged lien for rent, it was only incumbent on plaintiff, in making her case in chief, to prove ownership of the furniture, and the taking and detention by defendants against her consent, the burden of justification being on defendants, and, after introduction of their evidence, plaintiff could in rebuttal show the eviction, and that no rent was due.—*Osmers v. Furey et al.*, 581.

LAW OF THE CASE.

See, also, *Receivers*, 24.

Former Appeal.

1. The decision of the supreme court on questions directly involved and considered on a former appeal is the law of the case on a second appeal.—*Finlen v. Heinze et al.*, 354.

LEGISLATURE.

Legislative Power—Plenary—Constitutional Limitations.

1. In the matter of legislation, the people, through the legislature, have plenary power, except in so far as prohibited by the Constitution, and one denying the authority in any given instance must point out distinctly the particular constitutional provision limiting or prohibiting the power exercised.—*Missouri River Power Co. v. Steele*, 433.

Duties of County Officers—Constitution.

2. The legislature may not enact any law in conflict with constitutional provisions defining the duties of county officers; but so far as such duties are not prescribed by the Constitution, they may be by legislative enactment.—*Missouri River Power Co. v. Steele*, 433.

Board of Appraisers—Statutes—Constitutionality—Assessor.

3. *Held*, that in creating a board of appraisers to fix the valuation of real property for the purpose of assessment by Act of fifth legislative assembly (Session Laws of 1897, p. 195), the legislature was acting within its authority, and that in clothing the board with power to fix the valuation on real property in the first instance, no

provision of the Constitution was contravened; hence a taxpayer had no right to have his property taxed on the valuation as made by the assessor.—*Missouri River Power Co. v. Steele*, 433.

Power to Create—County Offices.

4. The legislature may create new county offices and devolve upon them duties respecting the management and control of county affairs.—*Missouri River Power Co. v. Steele*, 433.

LICENSES.

Mines—Verbal Agreement—Revocation—Rights of Licensees.

1. A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license, revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a right to the ore, as personalty, when extracted from the mine.—*Clark v. Wall et al.*, 219.

Mines—Injunction—When Proper.

2. Where a license to extract ores from a mining claim was revoked, and the licensees, who were insolvent and unable to respond in damages, nevertheless refused to surrender possession of the claim, and continued and threatened to continue the mining of the ore, thereby destroying the substance of the licensor's estate in the claim, the latter was entitled to an injunction restraining the further continuance by the licensees of their wrongful acts.—*Clark v. Wall et al.*, 219.

LIENS.

Action on Building Contract—Pleadings—Answer—Replication.

1. Where a building contract provided that the owner might protect itself against any lien which might be filed on the building by withholding from the contractor a sum sufficient to liquidate the same, and in an action by the contractor to recover an alleged balance due on the contract, the defendant alleged in its answer that a lien was filed for a certain sum and was paid by the defendant, the failure of the plaintiff to deny the allegations by his replication entitled the defendant to a deduction from the contract price in the amount of the lien discharged.—*Wagner v. St. Peter's Hospital*, 206.

Mortgages.

2. A mortgage does not convey the legal title to the property mortgaged, but is a mere lien to secure the performance of the contract to which it is incident.—*Cornish v. Woolverton et al.*, 456.

LIFE INSURANCE.

See Insurance.

LIMITATIONS.

Contracts—Contingency.

1. Where a contract was made to become due on the happening of a certain contingency, a suit brought within eight years after the happening of the contingency, but more than eight years from the date of the execution of the contract, was not barred.—*Noyes v. Young et al.*, 226.

LIVE STOCK.

See Cattle, 1, 2, 3; Railroads, 1, 2.

MANDAMUS.

Governor—Certificate of Election—Affidavit—Insufficiency.

1. An affidavit on application for writ of *mandamus* to the governor to issue a certificate of election to relator as one of the judges of a certain district held insufficient, where it merely alleged that the law provides for three judges in such district, that at the election there were six candidates, and that the relator, as one of the candidates, received the third highest number of votes, the court taking judicial notice of the fact that the governor's proclamation called for the election of two judges only in such district, and that three political party organizations had tickets in the field seeking the suffrages of the people for their respective candidates. Under such circumstances the presumption will not be indulged that the electors voted for more than two candidates for judgeships.—State ex rel. Breen v. Toole, Governor, 4.

What Relator must Show.

2. To warrant the issuance of *mandamus*, relator must show, among other things, a clear legal right in himself to have a particular act or duty performed by the defendant.—State ex rel. Breen v. Toole, Governor, 4.

When Writ may be Invoked.

3. The right sought to be protected by *mandamus* must be a substantial one, and the writ may not be invoked to determine questions in which relator has no personal or pecuniary interest, or where its issuance will be futile.—State ex rel. Breen v. Toole, Governor, 4.

Affidavit—Contents—Inference—Speculation.

4. The affidavit on which an application for *mandamus* is based must set forth clearly and succinctly the facts furnishing the foundation for the relief sought, leaving nothing to inference or speculation.—State ex rel. Breen v. Toole, Governor, 4.

Elections—Canvassing Officers—Evidence.

5. *Obiter*: Courts in *mandamus* proceedings to compel the performance of the ministerial duties of canvassing officers cannot hear evidence touching the regularity or legality of any election and decide controversies touching these matters.—State ex rel. Breen v. Toole, Governor, 4.

Elections—Board of Canvassers—Abatement.

6. *Mandamus* proceedings, instituted against the state treasurer and the attorney general, as a majority of the state board of canvassers, to compel them to reconvene and certify certain votes cast for the relator for the office of district judge, dismissed as abated, where prior to the hearing the terms of such officers had expired, so that they could not perform the mandate of the writ if issued, where their successors had not been given notice of the proceedings, and where no demand had been made upon them to perform the duties the performance of which was sought by the writ.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

Dismissed as Abated—When.

7. Where a *mandamus* proceeding has abated because of the expiration of the terms of office of the officials against whom it is directed, it will be dismissed, although the question of abatement has not been raised by counsel on either side.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

Dismissal of Action—Reinstatement of Cause.

8. *Held*, that where, after defendant's motion for judgment on the pleadings had been argued and submitted, the court dismissed the

action without prejudice on plaintiff's motion, *mandamus* will lie to require the court to reinstate the cause, and determine defendant's motion, as an appeal from a judgment of dismissal, if available, would be inadequate in that it would not present for the determination of the appellate court the question as to whether or not the district court should pass upon the motion for judgment on the pleadings.—State ex rel. Mont. C. Ry. Co. v. District Court et al., 37.

Remedy—Plain, Speedy and Adequate.

9. If the remedy by appeal, or any other method than *mandamus*, is not plain, speedy and adequate, *mandamus* will lie, the case otherwise being a proper one.—State ex rel. Mont. C. Ry. Co. v. District Court et al., 37.

When It will not Lie.

10. *Obiter*: Where a district court has acted in a given particular, *mandamus* will not lie to correct the error in so acting.—State ex rel. Mont. C. Ry. Co. v. District Court et al., 37.

MAPS AND PAPERS.

See Jury, 21.

MASTER AND SERVANT.

Mines—Explosions—False Information—Vice-principal—Negligence.

1. Where, in an action for injuries to a miner by the discharge of a blast, it appeared that B. had charge of the operating department of the entire mine for defendant, and was authorized to hire and discharge men, and that he directed them where, when, and how to work, and that his supervision of the mine was supreme, except that defendant directed when new work was to be commenced, and B. falsely stated to plaintiff before he went into the mine that a blast by which plaintiff was injured had been discharged, B. was a vice-principal, and not plaintiff's fellow-servant, for whose negligence defendant was liable.—Allen v. Bell, 69.

Mines—Safe Place to Work—False Information by Vice-principal.

2. The rule that a master is not bound to provide and maintain a safe place for his servants to work, where they are creating the place, and when it is constantly being changed in character by their labor, and becomes dangerous solely by their negligence, did not justify a vice-principal in giving false information to plaintiff, a miner, to the effect that an unexploded blast in the mine, left by a former shift of workmen, had been exploded before plaintiff went into the mine at the time he was injured.—Allen v. Bell, 69.

Mines—Vice-principal—False Information—Negligence.

3. *Held*, that plaintiff, a miner, in an action for personal injuries, was entitled to rely on the information of the person in charge of the operating department of the mine—a vice-principal—that a charge of dynamite in a certain hole had been exploded, when in fact it had not, and was not guilty of negligence in working in the mine on the assumption that the explosion had taken place.—Allen v. Bell, 69.

Action for Injuries—Evidence—Negligence—Fellow-servant.

4. In an action for injuries to a servant, evidence *held* insufficient to show that A, by whose alleged negligence plaintiff was injured, was acting for the defendant as a vice-principal, and not as plaintiff's fellow-servant.—Gillies v. Clarke Fork Coal M. Co., 320.

MEASURE OF DAMAGES.

See Damages.

MINES AND MINING.

Master and Servant—Explosions—False Information—Vice-principal—Negligence.

1. Where, in an action for injuries to a miner by the discharge of a blast, it appeared that B. had charge of the operating department of the entire mine for defendant, and was authorized to hire and discharge men, and that he directed them where, when, and how to work, and that his supervision of the mine was supreme, except that defendant directed when new work was to be commenced, and B. falsely stated to plaintiff before he went into the mine that a blast by which plaintiff was injured had been discharged, B. was a vice-principal, and not plaintiff's fellow-servant, for whose negligence defendant was liable.—*Allen v. Bell*, 69.

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Licenses—Verbal Agreement—Revocation—Rights of Licensees.

4. A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license, revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a right to the ore, as personalty, when extracted from the mine.—*Clark v. Wall et al.*, 219.

Pleadings—Injunction—Estoppel—Ownership of Premises.

5. Where, in an action for an injunction, the complaint alleged that defendants' use of mining premises was merely permissive, and that their right to such use was terminable at plaintiff's pleasure, the defendants, having failed to file any answer or pleading, are estopped to contend that plaintiff was not the owner of the premises.—*Clark v. Wall et al.*, 219.

Licenses—Injunction—When Proper.

6. Where a license to extract ores from a mining claim was revoked, and the licensees, who were insolvent and unable to respond in damages, nevertheless refused to surrender possession of the claim, and continued and threatened to continue the mining of the ore, thereby destroying the substance of the licensor's estate in the claim, the latter was entitled to an injunction restraining the further continuance by the licensees of their wrongful acts.—*Clark v. Wall et al.*, 219.

Oral Agreement for Sale—Evidence—Sufficiency—Specific Performance.

7. Evidence on a counterclaim for specific performance *held* sufficient

to show a complete oral agreement for sale of interests in a mine.—*Finlen v. Heinze et al.*, 354.

Ejectment—Trial on Counterclaim—Specific Performance.

8. Where plaintiff sues in ejectment for a mine, but trial is had only on the counterclaim for specific performance of plaintiff's contract to convey the mine to defendant, the answer thereto, and the reply to such answer, the answer to the complaint in ejectment, denying plaintiff's right in the property, is not properly before the court, and so cannot affect defendant's right to specific performance.—*Finlen v. Heinze et al.*, 354.

Specific Performance—Estoppel.

9. Defendant is not estopped to claim that he succeeded to plaintiff's interests in a mine by contract with plaintiff, by reason of having brought suit in plaintiff's name, after the date of the contract, to enjoin a third person from working the mine, this having been under an arrangement with plaintiff, and he not having been misled thereby.—*Finlen v. Heinze et al.*, 354.

Specific Performance—Exclusive Possession—Acts Inconsistent with.

10. The fact that plaintiff's foreman visited the mine in controversy several times during defendant's possession, and at one time directed the attention of defendant's foreman to the condition of the shaft, is not inconsistent with defendant's exclusive possession of the property under an oral option for its purchase from plaintiff, so as to bar his right to specific performance.—*Finlen v. Heinze et al.*, 354.

Specific Performance—Improvements.

11. Plaintiff may not defeat specific performance of an oral agreement for the sale of a mine which he gave defendant, on the ground that the latter after taking possession, had made but slight expenditures in improvements, where defendant cleaned out the mine—which had been practically abandoned—repaired and replaced mining apparatus, and ran drifts and cross-cuts, discovering bodies of valuable ore in a few weeks where plaintiff had spent a considerable fortune in unsuccessful attempts to find ore bodies in paying quantities.—*Finlen v. Heinze et al.*, 354.

Specific Performance—Purchase Price—Tender—Pleading.

12. The counterclaim for specific performance of an oral agreement for the sale of a mine, possession of which plaintiff seeks to recover, need not allege a tender of the purchase price where it appears that plaintiff has denied the contract, and that acceptance of a tender would be refused; but it is enough to allege that defendant has at all times been able, willing and ready to comply with all conditions of the contract, and binds himself to pay the purchase money if he be given a decree for specific performance.—*Finlen v. Heinze et al.*, 354.

Adverse Suits—Government not Party—Effect of Judgment.

13. Under Revised Statutes of the United States, section 2326, the government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contending claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered.—*Butte Land & Inv. Co. et al. v. Merriman et al.*, 402.

Adverse Suits—Effect of Judgment.

14. The adjudication in a state court in an adverse suit is not conclusive of the prevailing party's right to the property in controversy

as against the government, nor sufficient to divest the government of the title; neither is it of itself sufficient to entitle the prevailing party to a patent.—*Butte Land & Inv. Co. et al. v. Merriman et al.*, 402.

Mining Corporations—Money Advanced by Employee—Recovery.

15. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff, general manager of the company, in payment of services of certain employees of defendant, testimony of plaintiff that he turned over certain concentrates to the secretary of the defendant, and that he advanced the money with the understanding that he should be reimbursed therefor from the proceeds of the concentrates, conclusively limited his recovery to the amount realized from the sale of such concentrates.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Money Advanced—Recovery—Evidence.

16. In an action against a mining corporation to recover money alleged to have been advanced by him, as general manager of the company, in payment of services of certain employees of defendant, with the understanding that he be reimbursed from the proceeds of certain concentrates turned over to the secretary of the corporation, plaintiff was not entitled to recover in the absence of evidence showing that the concentrates were sold and a sum sufficient to reimburse him received therefrom.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Powers of Secretary.

17. The secretary of a mining company, who is not a member of the board of directors nor the agent of the corporation, has no authority to act for it beyond that given him as such secretary.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Liability—Directors—Evidence.

18. Evidence that three directors of a mining corporation acknowledged the justness of a claim against the corporation, and agreed that it should be paid, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity, does not establish an obligation against the corporation.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Money Advanced—Liability—Cross-examination.

19. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff as general manager, in payment of services of certain employees of defendant, a written contract between the plaintiff and defendant, providing that the plaintiff should at no time during the continuance of the agreement incur any indebtedness in excess of the value of the result of the operations which should create any liability against the company, and limiting plaintiff's compensation to twenty per cent of the net proceeds of the mining operations, was admissible as part of the cross-examination of the plaintiff.—*Farrell v. Gold Flint Min. Co.*, 416.

Mining Corporations—Work and Labor Claim—*Bona Fide* Holder.

20. One who took a claim against a mining corporation for labor performed while he was manager of the property with knowledge that he had no authority to incur any expense beyond the value of the proceeds of the mining operations, is not entitled to recover thereon in the absence of evidence showing that there were sufficient products of his mining operations on hand to pay the claim; nor is he a *bona fide* purchaser for value, having taken the claim with full knowledge of the limitation of his authority to incur expense.—*Farrell v. Gold Flint Min. Co.*, 416.

MORTGAGES.

See, also, Chattel Mortgages.

Record—Certificate of Acknowledgment—Sufficiency—Clerical Error.

1. Under Civil Code, sections 1640, 1641, providing for the recording of deeds, and making them constructive notice to subsequent purchasers, and section 4667, declaring that every person who has actual notice sufficient to put him on inquiry has constructive notice of the fact itself, if by inquiry he might have learned such fact, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that, in the statement that the parties "severally acknowledged—he—executed the same," the blanks before and after the word "he" were not filled so as to make the word "they."—*Trerise v. Bottego et al.*, 244.

Statutory Requirements to be Strictly Followed.

2. The statutory requirements intended to protect the lien of the mortgagee on the mortgaged property against attaching creditors must be strictly followed.—*First Nat. Bank of Butte v. Beley et al.*, 291.

Note Secured by Mortgage—When Non-negotiable.

3. Where a note is secured by a mortgage of even date with the note, and the mortgage provided that the mortgagor should pay the taxes and insurance, keep the property in repair, commit no waste, etc., and that in default of performance of any covenant the principal and interest should become due, and the mortgage be subject to foreclosure, at the option of the mortgagee, and that, if foreclosure proceedings were commenced, \$150 should be allowed as an attorney's fee, the note and mortgage are held to be parts of the same contract, under Civil Code, section 2207, which must be read and construed together, thus rendering the fulfillment of the entire contract uncertain and the note therefore non-negotiable.—*Cornish v. Woolverton et al.*, 456.

Notes—Assignment.

4. A mortgage given to secure the payment of a note is but an incident, and passes to the assignee of the note.—*Cornish v. Woolverton et al.*, 456.

Liens.

5. A mortgage does not convey the legal title to the property mortgaged, but is a mere lien to secure the performance of the contract to which it is incident.—*Cornish v. Woolverton et al.*, 456.

Note Secured by Mortgage—Negotiability.

6. *Quære*: Is a note, though negotiable in form, non-negotiable when secured by a mortgage, without regard to whether it contains any reference to the mortgage or any conditions contained therein?—*Cornish v. Woolverton et al.*, 456.

Conveyance.

7. A mortgage is a conveyance within the meaning of the Civil Code, sections 1640, 1641 and 1642, though of a chattel interest only.—*Cornish v. Woolverton et al.*, 456.

Assignment a Nullity—When.

8. The assignment of a mortgage, independent of the debt, is a nullity.—*Cornish v. Woolverton et al.*, 456.

Evidence of Debt—When.

9. In the absence of any written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment.—*Cornish v. Woolverton et al.*, 456.

Assignment—Record—Notice.

10. Under Civil Code, sections 1640 and 3823, the record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured.—*Cornish v. Woolverton et al.*, 456.

Assignment—Notice—Purchaser for Value.

11. Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, who executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a purchaser for value free from encumbrances.—*Cornish v. Woolverton et al.*, 456.

Interest—Collection—Agency.

12. The mere fact that a person acted as the agent of the owner of a mortgage in collecting interest and delivering the canceled coupons, is not sufficient to show authority to collect the principal and discharge the mortgage.—*Cornish v. Woolverton et al.*, 456.

Debt—Collection Agent—Duty to Ascertain Authority.

13. One paying a debt secured by mortgage to a supposed agent of the owner of the mortgage is bound to ascertain the scope of the agent's authority, otherwise he assumes the risk incident to such failure to make inquiry.—*Cornish v. Woolverton et al.*, 456.

Assignment—Record—Estoppel.

14. Where an assignee of a mortgage recorded the assignment, and a purchaser of the mortgaged premises afterward paid the debt to the assignor, failure of the assignee to make claim to the ownership of the mortgage until two years after the assignment, and after the assignor had become insolvent, was not sufficient to estop the assignee from enforcing the security, nothing appearing to show that he failed to speak when he should, or that he actively or passively misled the defendants to their prejudice.—*Cornish v. Woolverton et al.*, 456.

MOTIONS.**Step in Case.**

1. A "motion" is but a step or proceeding in a case.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

MUNICIPAL CORPORATIONS.**Powers.**

1. A city has no powers except such as are conferred upon it by legislative grant, either directly or by necessary implication.—*City of Helena v. Kent*, 279.

Ordinances—Police Powers—Sidewalks.

2. An ordinance making it the duty of the "occupant" of premises to keep the sidewalk in front of and adjoining them free from snow, ice, slush and other impediments to safe and convenient travel, and imposing a penalty for failure to comply with its provisions, is a reasonable and proper exercise of the police powers incident to municipal corporations, and not repugnant to constitutional or statutory provisions.—*City of Helena v. Kent*, 279.

Ordinances—Sidewalks—Statutory Construction.

3. Political Code, section 4800, subdivision 7, as amended by Session Laws of 1897, page 203, provides that a city has power to require the owners of premises to keep the sidewalk in front of and adjoining

them free from snow, ice, etc. An ordinance of the city of Helena makes it the duty of the *occupants* of such premises within the city limits to do so. *Held*, that the city can proceed against the occupant as well as the owner, and that the remedy against the former is merely cumulative and not inconsistent with the exercise of the power granted in subdivision 7 of section 4800.—*City of Helena v. Kent*, 279.

Police Regulations—Infractions not Crimes—Action in Name of City.

4. Infractions of local police regulations, such as noncompliance with an ordinance making it the duty of an occupant of premises within city limits to keep them free from snow, ice, etc., are not, in their essence, crimes or misdemeanors, and actions arising out of them are properly prosecuted in the name of the city.—*City of Helena v. Kent*, 279.

Police Power—Statutory Construction.

5. The police power granted to municipal corporations under the "general welfare clause," is necessary to the tranquility, safety and protection of every well-ordered community, and constitutions and statutes, in the absence of provisions to the contrary, are to be construed with reference to that fact.—*City of Helena v. Kent*, 279.

NEGLIGENCE.

Contributory—Pleadings—Answer—Special Defense.

1. In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in defendant's answer.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Pleadings—Fellow-servant—Special Defense.

2. *Quære*: Is the defense of negligence of a fellow-servant in an action for damages for injury of person, a special defense which must be pleaded?—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Contributory—Pleadings—Answer—New Matter—Failure to Reply—Complaint—Anticipatory Denials.

3. Under Code of Civil Procedure, section 720, as amended by Session Laws of 1899, page 142, allegations in the answer of contributory negligence, in an action for personal injuries, constitute new matter, the truth of which is admitted by failure of plaintiff to reply thereto, and any mere anticipatory denials in the complaint of the facts constituting such new matter are insufficient.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Master and Servant—Mines—Explosives—False Information—Vice-principal.

4. Where, in an action for injuries to a miner by the discharge of a blast, it appeared that B. had charge of the operating department of the entire mine for defendant, and was authorized to hire and discharge men, and that he directed them where, when, and how to work, and that his supervision of the mine was supreme, except that defendant directed when new work was to be commenced and B. falsely stated to plaintiff before he went into the mine that a blast by which plaintiff was injured had been discharged, B. was a vice-principal, and not plaintiff's fellow-servant, for whose negligence defendant was liable.—*Allen v. Bell*, 69.

Mines—Master and Servant—Vice-principal—False Information.

5. *Held*, that plaintiff, a miner, in an action for personal injuries, was entitled to rely on the information of the person in charge of the operating department of the mine—a vice-principal—that a charge

former's enjoyment of all the water that he needs remains unimpaired, acquire a prescriptive right to use any given quantity of the water to the detriment of the former's appropriation.—*Norman v. Corbley*, 195.

Real Estate—Adverse Use.

2. A right by prescription against the owner of real estate may be acquired only by an open, notorious, exclusive and adverse holding, under a claim of right during the full statutory period—the use must be such as to constitute an invasion of a right which the owner may at any time assert, but fails to exercise until the full statutory period has passed.—*Bullerdick v. Hermsmeyer et al.*, 541.

Waters—Adverse Use.

3. If a use of water becomes and continues adverse and exclusive for the full period described by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.—*Bullerdick v. Hermsmeyer et al.* 541.

PRESUMPTIONS.

Nonsuit—Appeal.

1. On appeal from a judgment sustaining defendant's motion for a nonsuit made at the close of plaintiff's evidence, every fact which the evidence tends to prove will be deemed proved.—*Allen v. Bell*, 69.

Receivers—Wrongful Appointment—Measure of Damages.

2. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Accounts.

3. Under Code of Civil Procedure, section 3266, subsection 32, providing that it is presumed that a thing once proved to exist continues to exist as long as is usual with things of that nature, accounts which are shown to have once been good and collectible, are presumed to so continue.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Attorneys' Fees—How Fixed—Evidence.

4. Where the court has personal knowledge of the services rendered by attorneys for a receiver, it is not always necessary that it should hear evidence as to the amount which it should allow for attorneys' fees, as the court is presumed to know the value of attorneys' services, but such evidence may be admitted to inform the court what is just and reasonable under the circumstances.—*Hickey et al. v. Parrot C. & S. Co.*, 143.

Action on Contract—Consideration—Burden of Proof.

5. Under Civil Code, sections 2169 and 2170, providing that a written instrument is presumptive evidence of a consideration, and that the burden of showing its want lies with the attacking party, in an action on an instrument acknowledging an indebtedness and promising to pay it, a consideration need not be averred or proven independently of the proof of the contract itself.—*Noyes v. Young et al.*, 226.

Statement—Action for Injuries—Appeal.

6. Where, in an action for injuries to a servant, the principal controversy was whether defendant was guilty of any negligence in providing suitable appliances, and its liability rested on the question whether A was a fellow-servant or was acting for the defendant as a vice-principal, a specification of error in the statement for new trial that there was no evidence that A was an officer of defendant, that he stood in any other relation than that of fellow-servant to plaintiff, or that defendant was in any wise bound by his conduct in making an alleged change of a rope and snatch-block attached to the hoisting apparatus, the breaking of which caused the injury, sufficiently pointed out wherein the evidence was insufficient, as required by Code of Civil Procedure, section 1173.—*Gillies v. Clarke Fork Coal M. Co.*, 320.

Rape—Newly Discovered Evidence—Insufficiency.

7. In a prosecution for rape, newly discovered evidence examined, and *held* insufficient to warrant a new trial.—*State v. Jones*, 442.

Rape—Newly Discovered Evidence—Cumulative.

8. To entitle defendant, convicted of the crime of rape, to a new trial on the ground of newly discovered evidence, it must appear, among other things, that the new evidence be not cumulative merely.—*State v. Jones*, 442.

New Trial—District Courts—Discretion.

9. An application for a new trial is addressed to the sound legal discretion of the trial court.—*State v. Jones*, 442.

Claim and Delivery—Judgment—Damages—Remittal—Effect.

10. In an action in claim and delivery for property alleged to have been wrongfully seized by defendant, there was no evidence to sustain a finding for damages for the taking, and plaintiff remitted damages awarded by the verdict, judgment being entered in the alternative for the return of the property or for the value thereof. *Held* that, as defendants secured all the relief to which they were entitled, the fact that the usual course in such cases was not pursued was not sufficient ground for a new trial.—*Osmers v. Furey et al.*, 581.

Separable Issues—Appeal.

11. Where an issue as to damages is clearly separable from the other issues in a case, the supreme court, in order to correct a judgment including them, will order a new trial of such issue only.—*Osmers v. Furey et al.*, 581.

NONAPPEALABLE ORDERS.

See Orders, 2, 3, 4.

NON-NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NONSUIT.

Water Rights—Appropriation—Statutory Requirements—Evidence.

1. In an action for damages for using the water of a certain river, and for an injunction to prevent interference with the alleged rights of plaintiff therein, evidence examined, and *held* to warrant a nonsuit for failure of the plaintiff to comply with the requirements of Compiled Statutes, fifth division, sections 1250, 1251, 1256 and 1257, in making his alleged appropriation, in that he never diverted the water claimed to have been appropriated, or constructed any dam, ditch, flume, or work of any kind to convey water to any place for a beneficial purpose, or owned the land described in his notice, or any mine,

mill, smelter, ranch or property to which the water right was appurtenant, and on which the water could be utilized.—*Miles v. Butte Electric & Power Co.*, 56.

Appeal—Presumptions.

2. On appeal from a judgment sustaining defendant's motion for a nonsuit made at the close of plaintiff's evidence, every fact which the evidence tends to prove will be deemed proved.—*Allen v. Bell*, 69.

When Properly Overruled—Contracts—Pleadings.

3. A motion for nonsuit was properly overruled where, in an action on an instrument acknowledging an indebtedness and promising to pay it on the happening of a certain contingency, the answer admitted the execution of the instrument, its assignment to the plaintiff, the happening of the contingency, and nonpayment.—*Noyes v. Young et al.*, 226.

NOTARIES PUBLIC.

Contempt—Power of District Court to Punish.

1. *Quære*: Under Code of Civil Procedure, section 3306, may the district court lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the district court?—*State ex rel. Heinze v. District Court et al.*, 394.

NOTICE.

General Elections—Validity.

1. *Obiter*: To render a general election valid the formalities of notice, etc., are not necessary.—*State ex rel. Breen v. Toole, Governor*, 4.

Special Elections—Vacancies.

2. *Obiter*: It is only when special elections are held to fill vacancies, that the technicality of notice is essential.—*State ex rel. Breen v. Toole, Governor*, 4.

Non-negotiable Contracts—Assignment—Payment to Assignor.

3. Under Code of Civil Procedure, section 571, where the maker of a non-negotiable contract made for the payment of money or personal property, pays the assignor the debt or obligation without notice of an assignment of such contract, and in good faith, and takes an acquittance, such payment constitutes a complete defense to an action by the assignee.—*Cornish v. Woolverton et al.*, 456.

Mortgages—Assignment—Record.

4. Under Civil Code, sections 1640 and 3823, the record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured.—*Cornish v. Woolverton et al.*, 456.

Mortgages—Assignment—Purchaser for Value.

5. Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, who executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a purchaser for value free from encumbrances.—*Cornish v. Woolverton et al.*, 456.

County Board of Equalization—Assessment—Increase.

6. The giving of ten days' notice to the taxpayer is essential to confer upon a county board of equalization power to increase the assessed valuation of his property under section 3781 of the Political

Code, or to correct such assessment under the provisions of section 3789 of the same code. In either case the ten days' notice is jurisdictional.—*Montana Ore Pur. Co. v. Maher*, 480.

Assessment—Increase—Waiver.

7. Failure by the county board of equalization to give a taxpayer the ten days' notice of an increase in his assessment required by statute, is not waived by his voluntary appearance before the board, after the raise had been made, for the purpose of seeking a reduction of the assessment.—*Montana Ore Pur. Co. v. Maher*, 480.

Assessment—Increase—Jurisdiction of Board—Minutes.

8. Where the minutes of the county board of equalization showed that it did not meet until July 20th, and that a raise in an assessment was made July 29th, and before any appearance on the part of the taxpayer affected thereby, it was apparent that the ten days' notice of the raise, required by statute, could not have been given, and the board was without jurisdiction in the matter.—*Montana Ore Pur. Co. v. Maher*, 480.

Affidavit—Disqualification of Judge.

9. Notice of the filing of an affidavit disqualifying a judge, under section 180 of the Code of Civil Procedure, as amended by Act of the Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 9, need not be given to the adverse party.—*State ex rel. Jenkins v. District Court et al.*, 595.

Change of Place of Trial.

10. Notice of motion for change of place of trial, under section 615 of the Code of Civil Procedure, as amended by Act of Eighth Legislative Assembly, Second Extraordinary Session, 1903, page 8, is not required to be given to the adverse party.—*State ex rel. Jenkins v. District Court et al.*, 595.

OFFER OF PROOF.

Rejection—Appeal.

1. The rejection of an offer of proof will not be reviewed on appeal where the party making the offer did not state and have placed on the record what he intended to prove.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

ORDERS.

See, also, District Courts, 3, 4, 5.

Dismissal Without Prejudice—Not Final Judgment—Minutes—Appeal.

1. The mere entry in the minutes of the court of an order, under Code of Civil Procedure, section 1004, that an action "is dismissed without prejudice, as *per praece* filed" by plaintiff, is not a final judgment from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could have been entered.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Nonappealable—Final Judgment—Justices of the Peace.

2. An order of the district court, overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, is not a final judgment, nor a special order made after final judgment, so as to be appealable under Code of Civil Procedure, section 1722, as amended by the Act of 1899 (Session Laws of 1899, p. 146).—*Raymond v. Raymond et al.*, 170.

Nonappealable—How Reviewed.

3. If a particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment.—*Raymond v. Raymond et al.*, 170.

Appeal from Justice's Court—Dismissal—Nonappealable.

4. An order sustaining a motion to dismiss an appeal from a justice's court is not appealable. (Session Laws of 1899, p. 146.)—*Franzman v. Davies et al.*, 251.

District Courts—Departments—Distribution of Business—Order Binding.

5. After a district court, consisting of two or more departments, has distributed its business among the several departments by an order, concurred in by all the judges, such order should be held binding, even in the absence of rules, until revoked or modified by the authority that made it.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

ORDINANCES.

See *Municipal Corporations*, 2, 3, 4.

PARTIES.**Easements.**

1. An easement claimed on lands in possession of defendants cannot be adjudged in a suit to which the owner is not a party.—*Campbell v. Flannery et al.*, 119.

Mines—Adverse Suits—Government not Party—Effect of Judgment.

2. Under Revised Statutes of the United States, section 2326, the government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contending claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered.—*Butte Land & Inv. Co. et al. v. Merriman et al.*, 402.

PARTNERSHIPS.**Use of Fictitious Business Name.**

1. Sections 3280 and 3281 of the Civil Code, requiring a partnership transacting business in a fictitious name, or under a designation not showing the names of the persons interested, to file a certificate stating the facts, and to publish the same, do not apply to a person who uses as a business name his surname, followed by the words "Furniture & Carpet Co." and who is the sole owner of the business.—*Lander v. Sheehan*, 25.

PERSONAL INJURIES.

See, also, *Torts*, 1, 2, 3, 5; *New Trial*, 5, 6; *Master and Servant*.

Property Owner—Liability.

1. The maxim, "*Sic utere tuo ut alienum non laedas*," has no application to injuries occurring on one's own premises, but simply to injuries occurring on other lands by the wrongful use of one's own premises.—*Driscoll v. Clark*, 172.

Compulsory Physical Examination.

2. In an action for personal injuries, the district court, in the absence of legislation, may not compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court.—*May v. Northern Pac. Ry. Co.*, 522.

PHYSICIANS.**Personal Injuries—Compulsory Physical Examination.**

1. In an action for personal injuries, the district court, in the absence of legislation, may not compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court.—*May v. Northern Pac. Ry. Co.*, 522.

Witnesses—Privileged Communications—Waiver of Privilege.

2. Under Code of Civil Procedure, section 3183, providing that a licensed physician or surgeon, without his patient's consent, cannot be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe, where plaintiff on cross-examination admitted that a certain physician had attended and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her.—*May v. Northern Pac. Ry. Co.*, 522.

PLEADING AND PRACTICE (CIVIL).

Answer—Contributory Negligence—Special Defense.

1. In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in the defendant's answer.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Negligence—Fellow-servant—Special Defense.

2. *Quære*: Is the defense of negligence of a fellow-servant in an action for damages for injury of person, a special defense which must be pleaded?—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Answer—Contributory Negligence—New Matter—Failure to Reply—Complaint—Anticipatory Denials.

3. Under Code of Civil Procedure, section 720, as amended by Session Laws of 1899, page 142, allegations in the answer of contributory negligence, in an action for personal injuries, constitute new matter, the truth of which is admitted by failure of plaintiff to reply thereto, and any mere anticipatory denials in the complaint of the facts constituting such new matter are insufficient.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

What may Constitute a "Trial."

4. The argument and submission to the district court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within Code of Civil Procedure, section 1004, subdivision 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff "at any time before trial."—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal Without Prejudice—When Too Late.

5. Where a motion for judgment on the pleadings has been made by defendant, under the provisions of Code of Civil Procedure, section 722, as amended by Session Laws of 1899, page 142, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within Code of Civil Procedure, section 1004, subdivision 1.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Receivers—Wrongful Appointment—Damages—Complaint.

6. In an action for damages caused by the wrongful appointment of a receiver for a going and solvent corporation, where plaintiff did not claim either interest, prospective profits, or exemplary damages, allegations of the complaint concerning the extent of the business of the company, and the conduct of defendants tending to show fraud,

Wrongful Appointment—Liability for Damages.

5. Persons who wrongfully procure the appointment of a receiver for a going and solvent corporation become, after the appointment is judicially declared void, trespassers *ab initio*, and liable for the damages caused by their wrongful acts.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Damages—Pleadings.

6. In an action for damages caused by the wrongful appointment of a receiver for a going and solvent corporation, where plaintiff did not claim either interest, prospective profits, or exemplary damages, allegations of the complaint concerning the extent of the business of the company, and the conduct of defendants tending to show fraud, oppression, or malice, must be treated as surplusage.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Measure of Damages—Presumptions.

7. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Evidence—Malice—Probable Cause.

8. It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, to show that the appointment was procured maliciously, and without probable cause.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Measure of Damages—Attachment.

9. The fact that accounts and bills belonging to a corporation, which were not collected owing to the wrongful institution of receivership proceedings by defendants, were taken possession of by an attachment to satisfy an indebtedness of the corporation, does not affect the measure of the corporation's damages for the wrongful receivership.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Legally Appointed—Compensation.

10. Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, although the order of appointment be vacated or reversed.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Improperly Appointed—Liability for Compensation.

11. Where a receiver is improperly appointed, the party who procured his appointment is liable for his compensation.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Reversal of Order Appointing—Consequences—Duties.

12. Whenever the order appointing a receiver is reversed, his authority is taken away, and it then becomes his duty immediately to render his final report and demand his formal discharge.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Counsel—Contract of Employment—District Courts.

13. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or

agreement for compensation that is binding upon the court as it is its function to determine both the necessity for counsel and the compensation to be allowed therefor.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—How Determined.

14. In determining the compensation to be allowed a receiver, the circumstances and environments of the particular receivership should be considered.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Reasonableness.

15. While the receiver is entitled to a reasonable compensation for the management of the property, the fact that he is employed by the court, and not by the owner of the property, does not entitle him to any greater compensation than that which would be reasonable if he had been employed by the owner.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Extra Duties—Giving Bond.

16. Where extra duties are required of a receiver, such as the giving of a bond or the employment of counsel, he is entitled to extra compensation, in addition to that to which he would be entitled merely for the management of the property.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—How Fixed.

17. In fixing the compensation of a receiver, the considerations that should control the court are the value of the property in controversy, the practical benefits derived from the receiver's efforts, the time, labor, and skill needed or expended in the proper performance of his duties, and their fair value, measured by the common business standards, and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Percentage Basis.

18. *Obiter*: The percentage basis upon which to fix the compensation of a receiver is not always the equitable method.—Hickey et al. v. Parrot S. & C. Co., 143.

Duties—Books—Vouchers—Examination.

19. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that they may be ready for examination at any time.—Hickey et al. v. Parrot S. & C. Co., 143.

Counsel Fees—After Reversal of Order—Liability.

20. After an order appointing a receiver had been reversed on appeal, and more than a year after the termination of the receivership, the receiver and the defendant, without the consent of the party who had procured the appointment of the receiver, stipulated that the defendant's objections to the receiver's reports should be referred. *Held*, that the party who procured the appointment of the receiver was not liable for the fees of the attorneys representing the receiver on the reference.—Hickey et al. v. Parrot S. & C. Co., 143.

Negligence—Costs—Liability for Reimbursement.

21. Where costs have been incurred by the negligence of the receiver, he cannot, in equity, maintain a claim for reimbursement either out of the trust fund or from the party who caused his wrongful appointment.—Hickey et al. v. Parrot S. & C. Co., 143.

Reversal of Order of Appointment—Compensation—Attorneys' Fees—Liability.

22. A receiver is not entitled to compensation or allowance for attorneys' fees for any new business transacted after the filing of the

Complaint—Improper Joinder of Causes of Action—Waiver.

22. Where defendant failed to object to a complaint which blended two causes of action, contrary to the provisions of Code of Civil Procedure, section 672, the defect will be deemed to have been waived by such failure to object.—*Ayotte v. Nadeau*, 498.

Accounting—Complaint—Sufficiency.

23. A complaint containing no allegation of a demand for a general accounting, and a refusal by defendant, states no cause of action for an accounting.—*Ayotte v. Nadeau*, 498.

Tenants in Common—Action for Rents—Complaint—Sufficiency.

24. A complaint by a tenant in common against his cotenant alleged the making of a contract between the plaintiff and defendant whereby the latter was to erect a building on the common property at his own expense, and that, when the rents received by defendant were equal to one-half the cost of the building, the rents were to be equally divided between them, and that the rents received by the defendant therefrom were in excess of one-half the cost of the building, but that the defendant refused to account to plaintiff for his share. *Held*, that the complaint stated a cause of action for rents due under the contract, in view of Code of Civil Procedure, section 592, providing that, if any person shall assume and exercise exclusive ownership over any property held in common, the party aggrieved shall have his action for the injury.—*Ayotte v. Nadeau*, 498.

Breach of Contract—Complaint.

25. Where, in an action for breach of contract to purchase certain milk, the complaint alleged that plaintiff was then and there able, ready and willing, and offered to perform all the terms and conditions of the contract to be performed by him during the term of the contract, and was and would be during the entire continuance of the contract able, ready and willing to perform the same, and had offered so to do, etc., it was not objectionable for failure to allege in terms that plaintiff had "fully complied with all the terms and conditions of the contract by him to be kept and performed."—*Brazell v. Cohn et al.*, 556.

Claim and Delivery—Sufficiency of Complaint.

26. A complaint alleging that defendant at divers times prior to and within one year before a certain date wrongfully and without plaintiff's consent took certain cattle from his possession; "that on the 10th day of March, 1902, plaintiff was, ever since has been, and now is the owner of the following described cattle * * * of the value of \$1,200"; that before the commencement of the action on March 10, 1902, plaintiff demanded of defendant possession of the cattle; and that defendant still unlawfully withholds them from plaintiff's possession—was good as against a general demurrer.—*McGregor v. Lang*, 568.

Judgments—How to be Plead.

27. Under Code of Civil Procedure, section 745, providing that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceedings then pending in that court, under the provisions of the Bankruptcy Act of July 1, 1898, was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made."—*Mears v. Shaw*, 575.

Claim and Delivery—Complaint—Insufficiency.

28. *Obiter*: A complaint in claim and delivery is fatally defective which upon its face shows that the defendant did not have the property in his possession at the time the action was brought.—*Mears v. Shaw*, 575.

Landlord and Tenant—Eviction—Defense to Action for Rent.

29. Eviction by the landlord is a complete defense to an action for rent, the consideration for the agreement having failed by the wrongful act of the landlord in depriving the tenant of the beneficial use of the property.—*Osmers v. Furey et al.*, 581.

Claim and Delivery—Order of Proof—Burden of Proof—Justification—Rebuttal.

30. In an action in claim and delivery for furniture of plaintiff seized by defendant under an alleged lien for rent, it was only incumbent on plaintiff, in making her case in chief, to prove ownership of the furniture, and the taking and detention by defendants against her consent, the burden of justification being on defendants, and, after introduction of their evidence, plaintiff could in rebuttal show the eviction, and that no rent was due.—*Osmers v. Furey et al.*, 581.

Claim and Delivery—Counterclaims.

31. The transaction set forth in the complaint, in an action in claim and delivery for furniture of plaintiff lessee seized by defendant lessor under an alleged lien for rent, being the wrongful taking of the property, the cause of action alleged in defendants' counterclaim for water, rent, plumbing, etc., or damages to the building, etc., did not arise out of the transaction, nor was it connected with the subject of the action.—*Osmers v. Furey et al.*, 581.

Motion to Strike Out Counterclaim.

32. On the filing of an answer improperly interposing a counterclaim, plaintiff's motion to strike out the counterclaim should have been allowed.—*Osmers v. Furey et al.*, 581.

POLICE POWER.

Municipal Corporations—Ordinances—Sidewalks.

1. An ordinance making it the duty of the "occupant" of premises to keep the sidewalk in front of and adjoining them free from snow, ice, slush, and other impediments to safe and convenient travel, and imposing a penalty for failure to comply with its provisions, is a reasonable and proper exercise of the police powers incident to municipal corporations, and not repugnant to constitutional or statutory provisions.—*City of Helena v. Kent*, 279.

Municipal Corporations—Statutory Construction.

2. The police power granted to municipal corporations under the "general welfare clause," is necessary to the tranquility, safety and protection of every well-ordered community, and constitutions and statutes, in the absence of provisions to the contrary, are to be construed with reference to that fact.—*City of Helena v. Kent*, 279.

PREScription.

Water Rights—Title to *Corpus* of Water.

1. Under the Civil Code, section 1880, giving the right to appropriate the waters flowing in a stream, the title to the *corpus* of such waters cannot be acquired so that a prior appropriator, who has all the water that his necessities require, cannot question the right of another to use the remainder of the water, nor maintain an action against him on account of such use, and the latter cannot, so long as the

former's enjoyment of all the water that he needs remains unimpaired, acquire a prescriptive right to use any given quantity of the water to the detriment of the former's appropriation.—*Norman v. Corbley*, 195.

Real Estate—Adverse Use.

2. A right by prescription against the owner of real estate may be acquired only by an open, notorious, exclusive and adverse holding, under a claim of right during the full statutory period—the use must be such as to constitute an invasion of a right which the owner may at any time assert, but fails to exercise until the full statutory period has passed.—*Bullerdick v. Hermsmeyer et al.*, 54i.

Waters—Adverse Use.

3. If a use of water becomes and continues adverse and exclusive for the full period described by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.—*Bullerdick v. Hermsmeyer et al.* 541.

PRESUMPTIONS.

Nonsuit—Appeal.

1. On appeal from a judgment sustaining defendant's motion for a nonsuit made at the close of plaintiff's evidence, every fact which the evidence tends to prove will be deemed proved.—*Allen v. Bell*, 69.

Receivers—Wrongful Appointment—Measure of Damages.

2. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Accounts.

3. Under Code of Civil Procedure, section 3266, subsection 32, providing that it is presumed that a thing once proved to exist continues to exist as long as is usual with things of that nature, accounts which are shown to have once been good and collectible, are presumed to so continue.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Receivers—Attorneys' Fees—How Fixed—Evidence.

4. Where the court has personal knowledge of the services rendered by attorneys for a receiver, it is not always necessary that it should hear evidence as to the amount which it should allow for attorneys' fees, as the court is presumed to know the value of attorneys' services, but such evidence may be admitted to inform the court what is just and reasonable under the circumstances.—*Hickey et al. v. Parrot C. & S. Co.*, 143.

Action on Contract—Consideration—Burden of Proof.

5. Under Civil Code, sections 2169 and 2170, providing that a written instrument is presumptive evidence of a consideration, and that the burden of showing its want lies with the attacking party, in an action on an instrument acknowledging an indebtedness and promising to pay it, a consideration need not be averred or proven independently of the proof of the contract itself.—*Noyes v. Young et al.*, 226.

Sales—Personal Property—Delivery.

6. *Held*, that Civil Code, section 4491, providing that a transfer of personal property, not accompanied by immediate delivery and followed by actual and continued change of possession is conclusively presumed fraudulent and void as against a subsequent purchaser in good faith, applies to a sale of range cattle.—*Ettien v. Drum*, 311.

Insurance—Contents of Policy.

7. The assured is presumed to know, and it is his duty to read, the contents of a policy and all conditions and limitations therein contained.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Life Insurance—Retention of Premium—Ratification.

8. By retaining a premium paid on a life insurance policy two days after it was due, an insurance company is conclusively presumed to have ratified the act of its local agent in receiving it and to have waived a forfeiture of the policy for a noncompliance with its provisions in this regard.—*Collins v. Metropolitan Life Ins. Co.*, 329.

Rape—Information—Surplusage.

9. In an information charging rape of a female under sixteen years of age, the words "against the consent of said" prosecutrix, are merely surplusage, the law presuming that such a child is incapable of giving consent, and but one offense is charged.—*State v. Jones*, 442.

Rape—Previous Good Character of Defendant.

10. In prosecutions for rape, evidence of previous good character of defendant is never conclusive, as a matter of law, in favor of defendant, and does not of itself raise a presumption in his favor.—*State v. Jones*, 442.

Probate Courts—Administrators—Specific Performance.

11. Where a petition filed by an administrator, under Compiled Statutes, Second Division, section 236, to enforce a contract by deceased to convey certain water rights, did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court, therefore, had jurisdiction to enforce the same.—*Bullerdick v. Hermmsmeyer et al.*, 541.

Claim and Delivery—Evidence—Support of Verdict.

12. On appeal from a judgment in claim and delivery for cattle converted by defendant, the court must presume, in the absence of the evidence, that such evidence supported the verdict, which found that plaintiff was the owner of only part of the cattle claimed, and placed a value upon the part, averaging more per head than the sum claimed for all averaged per head.—*McGregor v. Lang*, 568.

PRIVILEGED COMMUNICATIONS.

Physicians—Waiver of Privilege.

1. Under Code of Civil Procedure, section 3163, providing that a licensed physician or surgeon, without his patient's consent, cannot be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe, where plaintiff on cross-examination admitted that a certain physician had attended and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her.—*May v. Northern Pac. Ry. Co.*, 522.

PROBATE COURTS.

Statutes—Fair Trial—Bias and Prejudice—Judges—Disqualification.

1. The provisions of section 180 of the Code of Civil Procedure, as amended by Act of 1903 (Laws 1903, Second Extra. Session, p. 9), declaring that no judge shall continue to preside in any action or proceeding after an affidavit of bias or prejudice on his part has been filed, are applicable to probate proceedings.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

Homestead—Apportionment—Petition.

2. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, it was immaterial whether it acted on petition or on its own motion.—*Bullerdick v. Hermismeyer et al.*, 541.

Conveyances—Executors—Parol Contracts—Specific Performance—Jurisdiction.

3. *Quære*: Under the provisions of the Organic Act, could the legislature by Compiled Statutes, Second Division, section 236, clothe probate courts with jurisdiction to direct specific performance of a parol contract, by which decedent in his lifetime agreed to convey certain water rights to his wife?—*Bullerdick v. Hermismeyer et al.*, 541.

Jurisdiction.

4. Probate courts, or district courts sitting in probate, have but a special and limited jurisdiction, and their powers are such as are expressly granted by the statute, or necessarily implied to give effect to those expressly granted.—*Bullerdick v. Hermismeyer et al.*, 541.

Administrators—Specific Performance—Presumptions.

5. Where a petition, filed by an administrator, under Compiled Statutes, Second Division, section 236, to enforce a contract by deceased to convey certain water rights, did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court, therefore, had jurisdiction to enforce the same.—*Bullerdick v. Hermismeyer et al.*, 541.

Specific Performance—Void Decree—Curative Acts.

6. Where a decree of a probate court for specific performance of a contract by decedent in his lifetime to convey certain water rights to his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by Session Laws 1899, p. 145, subsequently passed, to validate judicial sales by executors and administrators, etc.—*Bullerdick v. Hermismeyer et al.*, 541.

PROCEEDINGS.

What is Included in Term "Proceeding."

1. The words "action" and "proceeding" include all intermediate steps to be taken in an action or proceeding.—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

PROHIBITION.

Judges—Disqualification—Fair Trial.

1. Prohibition does not lie to stay a district judge from proceeding further in the hearing of a motion made in a probate proceeding, where an affidavit of disqualification was not filed before the day fixed for the hearing of such motion. (Laws of 1903, Second Extra. Session, p. 9.)—*State ex rel. Nissler et al. v. Donlan et al.*, 256.

When Writ will not Lie to Control Judicial Action.

2. The supreme court will not by prohibition restrain the district court from entertaining and determining a motion to strike an answer from the files and enter judgment by default, under Code of Civil Procedure, section 3306, authorizing such action where a party refuses to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when so required, on the ground that such section is unconstitutional, although the district court may have erroneously decided to uphold the constitutionality of the section, and may, in consequence, eventually make an order which will be in excess of its jurisdiction.—State ex rel. Heinze v. District Court et al., 394.

District Courts—Jurisdiction—Mistaken Exercise.

3. If the district court has jurisdiction of the subject matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy of prohibition. "It is within its jurisdiction to dispose of the matter rightly or wrongly."—State ex rel. Heinze v. District Court et al., 394.

When Supreme Court will not Grant Writ.

4. The supreme court will not grant the writ of prohibition, or any writ, if not properly invocable, even though no objection be made by counsel to the exercise of its extraordinary power in the premises.—State ex rel. Heinze v. District Court et al., 394.

PROMISSORY NOTES.

See Bills and Notes.

PUBLIC LANDS.**Entry—Ditches—Easement.**

1. Where lands have been withdrawn from the public domain by entry, and a ditch and its uses were a burden thereon by grant from the government at the time of the entry, such burden cannot be added to in favor of a third person under Act of Congress of July 26, 1866 (14 Stat. 251, chapter 262), giving citizens the privilege of running a ditch over unoccupied government lands.—Campbell v. Flannery et al., 119.

Action Against Government.

2. One may not have his right to public land, as against the government, determined by the courts in an action against the government.—Butte Land & Inv. Co. et al. v. Merriman et al., 402.

Mining Claims—Adverse Suits—Effect of Judgment.

3. The adjudication in a state court in an adverse suit is not conclusive of the prevailing party's right to the property in controversy as against the government, nor sufficient to divest the government of the title; neither is it of itself sufficient to entitle the prevailing party to a patent.—Butte Land & Inv. Co. et al. v. Merriman et al., 402.

PURCHASER FOR VALUE.**Mining Corporations—Work and Labor Claim—*Bona Fide* Holder.**

1. One who took a claim against a mining corporation for labor performed while he was manager of the property with knowledge that he had no authority to incur any expense beyond the value of the proceeds of the mining operations, is not entitled to recover thereon in the absence of evidence showing that there were sufficient products of his mining operations on hand to pay the claim; nor is he a *bona fide* purchaser for value, having taken the claim with full knowledge of the limitation of his authority to incur expense.—Farrell v. Gold Flint Min. Co., 416.

Mortgage—Assignment—Notice.

2. Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, who executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a purchaser for value free from encumbrances.—*Cornish v. Woolverton et al.*, 456.

RAILROADS.**Killing Live Stock—Evidence—Negligence.**

1. In an action against a railroad company for killing cattle, the engineer testified that a curve in the track prevented his seeing the cattle until he was about two hundred feet from them; that the train was running between forty-one and forty-two miles per hour, and was equipped with air-brakes, which were in first-class condition; that on seeing the cattle he made "an emergency application of the brakes" and gave the stock alarm; that he did all he could to prevent striking the cattle; that he stopped the train within six hundred feet; and that to stop within one thousand feet would be a good stop. *Held*, that this testimony being uncontradicted, and there being no evidence of negligence, a verdict for defendant should have been directed. *Carman v. Mont. C. Ry. Co.*, 137.

Killing Stock—Value—Evidence—Indefiniteness—Judgment.

2. Where three of plaintiff's animals were killed and three were injured, testimony merely as to the value of the animals killed and injured, and failing to show clearly the damages sustained by reason of the injury to those not killed, is too indefinite on which to base a judgment.—*Carman v. Mont. C. Ry. Co.*, 137.

Railways of Commerce—Street Railroads—Statutory Construction.

3. Section 707, fifth division, Compiled Statutes of 1887, providing that a judgment against any railway corporation for an injury to person or property, or for material furnished to, or work or labor done upon the property of such corporation, shall be a lien prior and superior to the lien of any mortgage or trust deed, being a part of the Act of March 3, 1887, which treats exclusively of railways of commerce, has no application to street railroads.—*Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, 298.

RAPE.

See Criminal Law, 2, 3, 7-15.

RATIFICATION.

See Agency, 3, 4.

REAL ESTATE.

Liability of owner to trespassers, see Trespassers, 1.

Injuries—Owner—Liability.

1. The maxim, "*Sic utere tuo ut alienum non laedas*," has no application to injuries occurring on one's own premises, but simply to injuries occurring on other lands by the wrongful use of one's own premises.—*Driscoll v. Clark*, 172.

Building Contracts—Subcontractor—Judgment—Res Judicata—Owner.

2. Where a subcontractor did the painting of a building for the contractor who had undertaken the construction of the entire building, a judgment in favor of the subcontractor, in a suit by him against the principal contractor to recover on account of the work

done, is not *res judicata* as to the owner, so as to bar litigation of the question, between the owner and the principal contractor, whether the painting was done in accordance with the principal contract.—*Wagner v. St. Peter's Hospital*, 206.

Resulting Trusts—Consideration—When to be Made.

3. To raise a resulting trust in favor of one who pays the purchase price of property, title to which is taken in the name of another, the payment of the consideration must be made at the time when, or before, the legal title to the property passes to the party to be charged.—*Lynch v. Herrig*, 267.

Resulting Trusts—When Declared.

4. A resulting trust in land can only be declared when the legal title has passed to the party against whom the trust is sought to be declared.—*Lynch v. Herrig*, 267.

Resulting Trusts—Equitable Title—When Property.

5. An equitable title to land, which upon payment of a balance due on the purchase price will ripen into a legal title, is property, a resulting trust in which may be declared and enforced by a court of equity.—*Lynch v. Herrig*, 267.

Prescription—Adverse Use.

6. A right by prescription against the owner of real estate may be acquired only by an open, notorious, exclusive and adverse holding, under a claim of right during the full statutory period—the use must be such as to constitute an invasion of a right which the owner may at any time assert, but fails to exercise until the full statutory period has passed.—*Bullerick v. Hermsmeyer et al.*, 541.

RECEIVERS.

Wrongful Procurement—Executors—Survival of Action.

1. Under Code of Civil Procedure, section 2733, a cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of the decedent wrongdoer.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Evidence—Supreme Court Opinion.

2. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of the supreme court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by the defendants.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Evidence—Damages—Accounts.

3. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, plaintiff may show as an item of damage the amount of a good and collectible account which was lost by reason of the receivership.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Evidence—Damages—Accounts.

4. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, evidence of the loss of an account through the receivership and the statute of limitations, is admissible, although no trial of the question in the courts had been had.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Liability for Damages.

5. Persons who wrongfully procure the appointment of a receiver for a going and solvent corporation become, after the appointment is judicially declared void, trespassers *ab initio*, and liable for the damages caused by their wrongful acts.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Damages—Pleadings.

6. In an action for damages caused by the wrongful appointment of a receiver for a going and solvent corporation, where plaintiff did not claim either interest, prospective profits, or exemplary damages, allegations of the complaint concerning the extent of the business of the company, and the conduct of defendants tending to show fraud, oppression, or malice, must be treated as surplusage.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Measure of Damages—Presumptions.

7. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is, under Civil Code, sections 4270, 4330, 4333, and 4334, the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Evidence—Malice—Probable Cause.

8. It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, to show that the appointment was procured maliciously, and without probable cause.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Wrongful Appointment—Measure of Damages—Attachment.

9. The fact that accounts and bills belonging to a corporation, which were not collected owing to the wrongful institution of receivership proceedings by defendants, were taken possession of by an attachment to satisfy an indebtedness of the corporation, does not affect the measure of the corporation's damages for the wrongful receivership.—*Thornton-Thomas Merc. Co. v. Bretherton et al.*, 80.

Legally Appointed—Compensation.

10. Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, although the order of appointment be vacated or reversed.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Improperly Appointed—Liability for Compensation.

11. Where a receiver is improperly appointed, the party who procured his appointment is liable for his compensation.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Reversal of Order Appointing—Consequences—Duties.

12. Whenever the order appointing a receiver is reversed, his authority is taken away, and it then becomes his duty immediately to render his final report and demand his formal discharge.—*Hickey et al. v. Parrot S. & C. Co.*, 143.

Counsel—Contract of Employment—District Courts.

13. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or

agreement for compensation that is binding upon the court as it is its function to determine both the necessity for counsel and the compensation to be allowed therefor.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—How Determined.

14. In determining the compensation to be allowed a receiver, the circumstances and environments of the particular receivership should be considered.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Reasonableness.

15. While the receiver is entitled to a reasonable compensation for the management of the property, the fact that he is employed by the court, and not by the owner of the property, does not entitle him to any greater compensation than that which would be reasonable if he had been employed by the owner.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Extra Duties—Giving Bond.

16. Where extra duties are required of a receiver, such as the giving of a bond or the employment of counsel, he is entitled to extra compensation, in addition to that to which he would be entitled merely for the management of the property.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—How Fixed.

17. In fixing the compensation of a receiver, the considerations that should control the court are the value of the property in controversy, the practical benefits derived from the receiver's efforts, the time, labor, and skill needed or expended in the proper performance of his duties, and their fair value, measured by the common business standards, and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted.—Hickey et al. v. Parrot S. & C. Co., 143.

Compensation—Percentage Basis.

18. *Obiter*: The percentage basis upon which to fix the compensation of a receiver is not always the equitable method.—Hickey et al. v. Parrot S. & C. Co., 143.

Duties—Books—Vouchers—Examination.

19. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that they may be ready for examination at any time.—Hickey et al. v. Parrot S. & C. Co., 143.

Counsel Fees—After Reversal of Order—Liability.

20. After an order appointing a receiver had been reversed on appeal, and more than a year after the termination of the receivership, the receiver and the defendant, without the consent of the party who had procured the appointment of the receiver, stipulated that the defendant's objections to the receiver's reports should be referred. *Held*, that the party who procured the appointment of the receiver was not liable for the fees of the attorneys representing the receiver on the reference.—Hickey et al. v. Parrot S. & C. Co., 143.

Negligence—Costs—Liability for Reimbursement.

21. Where costs have been incurred by the negligence of the receiver, he cannot, in equity, maintain a claim for reimbursement either out of the trust fund or from the party who caused his wrongful appointment.—Hickey et al. v. Parrot S. & C. Co., 143.

Reversal of Order of Appointment—Compensation—Attorneys' Fees—Liability.

22. A receiver is not entitled to compensation or allowance for attorneys' fees for any new business transacted after the filing of the

viding that, if any person shall assume and exercise exclusive ownership over any property held in common, the party aggrieved shall have his action for the injury.—Ayotte v. Nadeau, 498.

Action by One Tenant in Common Against the Other—Rent—Scope of Action.

10. In an action at law by one cotenant against another for rents collected and retained by the defendant for the use of a building on the common property, the interests of the parties in the building itself cannot be adjudicated, an action in ejectment being required for that purpose.—Ayotte v. Nadeau, 498.

Action for Rents—Burden of Proof—Instructions.

11. In an action by a tenant in common against his cotenant for rents alleged to be due to the plaintiff under a contract for the erection of a building at defendant's expense, and an equal division of rents after defendant was reimbursed by receipts of rent therefrom to the extent of one-half the cost, the burden was on plaintiff to show that defendant had been so reimbursed, and an instruction casting the burden upon defendant to show by a clear preponderance of the evidence that the building cost more than the amount alleged by plaintiff was prejudicial error.—Ayotte v. Nadeau, 498.

Action for Rents—Contract—Statute of Frauds.

12. A contract between tenants in common for the erection of a house on the common property by one at his own expense, and requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, is not within Civil Code, section 2340, providing that certain contracts for the sale of personal property shall not be enforceable unless in writing, nor within section 2342 of the same code, making the same provision in relation to contracts for the sale of land or any interest therein.—Ayotte v. Nadeau, 498.

Action for Rents—Statute of Frauds.

13. Where a contract between plaintiff and defendant as tenants in common provided for the erection of a house on the common property by defendant at his own expense, requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, and there was an immediate performance by plaintiff by his surrender to defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent should pay for the erection of the building, the contract was enforceable irrespective of the Civil Code, section 2185, subdivision 1, which provides that an agreement not to be performed within a year is invalid unless in writing, such subdivision 1 being applicable to those contracts only which *by their terms* are not to be performed within one year by *either* party.—Ayotte v. Nadeau, 498.

Action for Rents—Contracts—Statute of Frauds.

14. A contract between tenants in common for the erection of a house on the common property by one of them at his own expense, and requiring him to make an equal division of the rents when the rents received equaled one-half the cost, is not a contract of leasing within Civil Code, section 2185, subdivision 5, providing that an agreement for the leasing of real property for a longer period than one year is invalid unless in writing.—Ayotte v. Nadeau, 498.

Interest of Each—Water Rights—How Measured.

15. Where parties acquired certain land in separate parcels from the owners of a water right appurtenant to the land, they each became vested with an interest in the water measured in amount by the requirements of each, whether they were tenants in common or not.—Bullerdick v. Hermesmyer et al., 541.

RECORD ON APPEAL.

Alteration Without Order of Court—Dismissal.

1. Where counsel for appellant was allowed by the clerk of the supreme court to take the record from his office, and thereafter the record was rearranged in certain particulars, and changes made by incorporating in it a certificate of the trial judge settling the bill of exceptions and the notice of appeal, and by adding an entirely new certificate of the clerk of the district court, bearing date a month later than the supreme court file-marks, the appeal will be dismissed, though counsel, after notice of motion to dismiss, filed a suggestion of diminution of the record and asked for an order directing the clerk of the district court to correct the defects and supply the omissions, theretofore attempted to be done without such order.—*State v. Franceschi*, 495.

REFEREES.

Findings and Recommendations—Setting Aside.

1. *Quære*: May a trial court disregard the findings and recommendations of a referee, under an order of reference contemplating the report of a final decree settling an account in accordance with the findings of fact and conclusions of law of the referee?—*State ex rel. Nissler et al v. Donlan et al*, 256.

REHEARINGS.

Petition—When Proper to be Presented—When not.

1. A petition for rehearing should be presented only in those cases where reasonably good grounds therefor exist, and this should appear on the face of the petition. The court should not be asked to reconsider matters which have been considered and determined, especially where its view is conceded by counsel to be supported by authority.—*Collins v. Metropolitan Life Ins. Co.*, 346.

RES JUDICATA.

Pleadings—Evidence—Findings.

1. Where plaintiff's equities have been presented under his complaint and in his evidence, and the defendant has failed to introduce any evidence, the trial court's finding that under the evidence plaintiff had not established his case, or had any equities, is *res judicata*, if the court's holding was correct.—*Campbell v. Flannery et al*, 119.

Building Contracts—Subcontractor—Judgment—Owner.

2. Where a subcontractor did the painting of a building for the contractor who had undertaken the construction of the entire building, a judgment in favor of the subcontractor, in a suit by him against the principal contractor to recover on account of the work done, is not *res judicata* as to the owner, so as to bar litigation of the question, between the owner and the principal contractor, whether the painting was done in accordance with the principal contract.—*Wagner v. St. Peter's Hospital*, 206.

RESULTING TRUSTS.

Arise by Operation of Law—Not Dependent upon Contracts.

1. The trust presumed to result, under Civil Code, section 1312, in favor of the person who pays the consideration for the purchase of property, title to which is taken in the name of another, does not arise from, or depend upon, a contract or agreement between the

parties, but is independent thereof and arises by operation of law, though such agreements may be considered in establishing the ownership of the money and how it was invested.—*Lynch v. Herrig*, 267.

Payment—When to be Made.

2. To raise a resulting trust in favor of one who pays the purchase price of property, title to which is taken in the name of another, the payment of the consideration must be made at the time when, or before, the legal title to the property passes to the party to be charged.—*Lynch v. Herrig*, 267.

What Part of Consideration to be Paid or Tendered.

3. To establish a resulting trust, where land sought to be charged therewith is purchased under an executory contract, the legal title only passing on payment of the price, it is sufficient if an aliquot part of the entire price is paid or tendered by the person claiming the existence of the trust, at any time before the legal title passes.—*Lynch v. Herrig*, 267.

Statute of Frauds—Inapplicable.

4. The statute of frauds is inapplicable in the case of resulting trusts.—*Lynch v. Herrig*, 267.

In Land—When Declared.

5. A resulting trust in land can only be declared when the legal title has passed to the party against whom the trust is sought to be declared.—*Lynch v. Herrig*, 267.

Equitable Title—When Property.

6. An equitable title to land, which upon payment of a balance due on the purchase price will ripen into a legal title, is property, a resulting trust in which may be declared and enforced by a court of equity.—*Lynch v. Herrig*, 267.

REVOCATION.

See Licenses, 1, 2.

RULES OF SUPREME COURT.

(For Rules promulgated February 1, 1905, see 30 Mont. xxix.)

Failure to File Briefs—Dismissal.

1. Supreme Court Rule X, subsection 5 (30 Mont. xxix), which provides that where an appellant is in default in filing his brief the case may be dismissed on motion, will not be relaxed where counsel was not prevented from observing it by press of other professional duties, or interruptions caused by illness or the like.—*State v. Franceschi*, 495.

SALES.

Warranty—Evidence—Jury.

1. In an action for the price of a stove alleged by defendant to be inferior to the warranty, testimony as to experiments by witness at cooking with the stove, and that the "things I tried to cook were not fit to eat, we couldn't eat them, I could not do anything with the stove," was not an invasion of the province of the jury as drawing conclusions from the evidence.—*Lander v. Sheehan*, 25.

Evidence—Trademarks.

2. In an action for the price of a stove alleged by defendant to have been worthless, the admission of testimony of a third person that he had purchased a stove of plaintiff bearing the same trademark, which proved to be worthless, was error.—*Lander v. Sheehan*, 25.

Instructions—Seller's Praise—Warranty—Opinion.

3. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by which the salesman indulged in an expression of opinion concerning the merits of the stove, does not constitute a warranty, and it is for the jury to determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the stove was made as one of fact or of mere opinion.—*Lander v. Sheehan*, 25.

Cattle—Instructions—Delivery.

4. Where, in an action in claim and delivery to recover certain cattle, both parties claimed under the same seller, a requested instruction that plaintiff, whose purchase was prior in time, was not entitled to recover any of the cattle except such as had been delivered and "paid for by him," was properly refused, a vendee not being required to pay for property purchased by him in order to make the transaction valid.—*Ettien v. Drum*, 311.

Personal Property—Delivery—Presumptions.

5. *Held*, that Civil Code, section 4491, providing that a transfer of personal property, not accompanied by immediate delivery and followed by actual and continued change of possession is conclusively presumed fraudulent and void as against a subsequent purchaser in good faith, applies to a sale of range cattle.—*Ettien v. Drum*, 311.

Range Cattle—Brands—Partial Delivery—Custom.

6. Where one purchases an entire herd of range cattle, together with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of the remnant not delivered.—*Ettien v. Drum*, 311.

Personal Property—Intention—Identification.

7. Under Civil Code, section 1540, the actual passing of title, as between the parties to a contract of sale of personal property, is made dependent upon the intention of the parties and the identification of the thing sold.—*Adlam et al. v. McKnight*, 349.

Personal Property—Intention—Question of Fact.

8. The intention of the parties to a contract of sale of personal property is one of fact, to be determined by the jury under proper instructions of the court.—*Adlam et al. v. McKnight*, 349.

Personal Property—Executory Agreement—Evidence.

9. Evidence held insufficient, under Civil Code, section 1540, to show that an agreement to sell certain cattle amounted to an actual sale, so as to make the vendee, who prior to delivery promised to retain a part of the purchase price and pay it to a creditor of the vendor, indebted to such creditor on account thereof.—*Adlam et al. v. McKnight*, 349.

SHERIFFS.

Nonperformance of Duty—Justice of the Peace—Jurisdiction.

1. Code of Civil Procedure, section 66, subdivision 1, does not clothe justice of the peace courts with jurisdiction to entertain an action brought against a sheriff for damages for nonperformance of an official duty and to recover a penalty imposed by law for its nonperformance, such an action not being one arising on contract.—*Oppenheimer v. Regan*, 110.

certain property in order to comply with an order of court awarding plaintiff alimony and counsel fees, and to pay certain debts. Defendant mortgaged the property, paid counsel fees and two months' alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses, failing thereafter to pay the alimony awarded. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in such an arbitrary or unlawful manner as to entitle defendant to a writ of supervisory control.—State ex rel. Dougan v. District Court et al., 34.

When Writ will Lie.

3. The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical.—State ex rel. Heinze v. District Court et al., 579.

When Issuance Premature.

4. While the lower court is proceeding within jurisdiction and before it has exceeded it, the invocation of action on the part of the supreme court by writ of supervisory control or otherwise is premature.—State ex rel. Heinze v. District Court et al., 579.

SUPPLEMENTAL TRANSCRIPTS.

See Appeal, 17.

SUPREME COURT.

Judicial Notice—Proclamation of Governor—Political History of State.

1. Under Code of Civil Procedure, section 3150, the court will take judicial notice of the contents of the proclamation of the governor calling an election, and of the political history of the state.—State ex rel. Breen v. Toole, Governor, 4.

Judicial Notice—State Officers—Mandamus—Terms of Office.

2. The supreme court will take judicial notice of the fact that on a certain date the persons sought to be coerced into action by *mandamus* were no longer state treasurer and attorney general, respectively, and that their successors had been elected, qualified and inducted into office.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

Administrators—Distribution of Estate—Appeal—Jurisdiction.

3. Where the distributees of a decedent's estate executed receipts for their respective shares under the decree of distribution, which was thereupon satisfied and the administrator discharged, the receipts reciting that they were not intended to cover any money or property referred to in the decree not yet discovered, thus implying that this exception was the only reservation made by the distributees as to the liability of the administrator, and thereafter appeal from such decree, the supreme court will dismiss such appeal for lack of jurisdiction.—In re Black's Estate, 51.

Receivers—Wrongful Appointment—Evidence—Supreme Court Opinion.

4. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of the supreme court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by the defendants.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

brought suit in plaintiff's name, after the date of the contract, to enjoin a third person from working the mine, this having been under an arrangement with plaintiff, and he not having been misled thereby.—*Finlen v. Heinze et al.*, 354.

Clear and Unambiguous Proof—Complete Agreement.

5. Where there is made out by clear and unambiguous proof a complete agreement for sale of a mine, with all the terms that the parties saw fit to incorporate in it, specific performance may be decreed, though other terms might properly have been incorporated in a contract respecting such a subject.—*Finlen v. Heinze et al.*, 354.

Mutuality—Performance.

6. The defense of want of mutuality is not available to defeat specific performance of an oral, optional contract where the party holding the option and seeking its enforcement has performed all its terms required to be performed by him.—*Finlen v. Heinze et al.*, 354.

Mines—Exclusive Possession—Acts Inconsistent with.

7. The fact that plaintiff's foreman visited the mine in controversy several times during defendant's possession, and at one time directed the attention of defendant's foreman to the condition of the shaft is not inconsistent with defendant's exclusive possession of the property under an oral option for its purchase from plaintiff, so as to bar his right to specific performance.—*Finlen v. Heinze et al.*, 354.

Mines—Improvements.

8. Plaintiff may not defeat specific performance of an oral agreement for the sale of a mine which he gave defendant, on the ground that the latter, after taking possession, had made but slight expenditures in improvements, where defendant cleaned out the mine—which had been practically abandoned—repaired and replaced mining apparatus, and ran drifts and cross-cuts, discovering bodies of valuable ore in a few weeks where plaintiff had spent a considerable fortune in unsuccessful attempts to find ore bodies in paying quantities.—*Finlen v. Heinze et al.*, 354.

Mines—Purchase Price—Tender—Pleading.

9. The counterclaim for specific performance of an oral agreement for the sale of a mine, possession of which plaintiff seeks to recover, need not allege a tender of the purchase price where it appears that plaintiff has denied the contract, and that acceptance of a tender would be refused; but it is enough to allege that defendant has at all times been able, willing and ready to comply with all conditions of the contract, and binds himself to pay the purchase money if he be given a decree for specific performance.—*Finlen v. Heinze et al.*, 354.

Interest on Purchase Price.

10. Where plaintiff gave defendant an option to buy a mine, but, before the payments agreed upon became due, denied the existence of the contract and sued to recover the property, he was not entitled (section 4280, Civil Code) to interest on the purchase money, on specific performance being decreed against him, for the reason that he himself prevented defendant from making the payments.—*Finlen v. Heinze et al.*, 354.

Probate Courts—Administrators—Presumptions.

11. Where a petition, filed by an administrator, under Compiled Statutes, Second Division, section 236, to enforce a contract by deceased to convey certain water rights, did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the

after the raise had been made, for the purpose of seeking a reduction of the assessment.—*Montana Ore Pur. Co. v. Maher*, 480.

County Board of Equalization—Final Action of Board—Record.

3. An entry on the minutes of the county board of equalization, after reciting errors in the returns made to the assessor by a taxpayer, directed that officer to make the proper correction in the assessment. The pleadings admitted that the board made the entry with respect to the assessment in the amount stated in the entry. *Held*, that no other changes or records being shown, a contention that final action was not taken in the matter until after the taxpayer's voluntary appearance before the board was without merit.—*Montana Ore Pur. Co. v. Maher*, 480.

County Board of Equalization—Minute Entries—Parol Evidence.

4. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the proceedings had before the county board of equalization, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.—*Montana Ore Pur. Co. v. Maher*, 480.

Jurisdiction of Board of Equalization—Affirmative Showing—Record.

5. As the county board of equalization, acting on assessments of property, is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear affirmatively from the record of its proceedings.—*Montana Ore Pur. Co. v. Maher*, 480.

Assessment—Increase—Injunction.

6. *Held*, that where the county board of equalization made an increase in an assessment without giving the statutory notice of ten days to the person affected thereby, such notice being jurisdictional, and omission to give it not being a mere irregularity subject to explanation, injunction will lie to restrain the collection of taxes computed on the raised valuation.—*Montana Ore Pur. Co. v. Maher*, 480.

Decree—Payment of Taxes Admittedly Due—Condition Precedent.

7. Where the county board of equalization raised an assessment without giving the ten days' notice required by statute, a decree enjoining the county treasurer from selling the property to pay the taxes computed on the raised valuation, without requiring, as a condition precedent, the payment of the tax admitted by the taxpayer to be due, was erroneous.—*Montana Ore Pur. Co. v. Maher*, 480.

TENANTS IN COMMON.

Injunctions—Pleadings—Waste.

1. (On motion for rehearing.) Where, in a suit to restrain interference with certain ditches, the complaint does not allege that defendants are tenants in common with plaintiff, but its theory is that defendants neither have nor claim any interest in the premises, defendants cannot be enjoined from cutting or damming the ditches on the theory that they are tenants in common, and, as such, cannot lawfully commit waste.—*Campbell v. Flannery et al.*, 119.

Water Rights—Unity of User.

2. To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and if such right is destroyed, the common tenancy ceases to exist.—*Norman v. Corbley*, 195.

Water Rights—Joint Notice of Appropriation.

3. Plaintiff's predecessors in interest appropriated waters for irrigation in 1866. Defendant made a subsequent appropriation in 1871

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STATUTE OF FRAUDS.

Resulting Trusts—Inapplicable.

1. The statute of frauds is inapplicable in the case of resulting trusts.—*Lynch v. Herrig*, 267.

TRESPASSERS.

Liability of Owner of Property—Negligence.

1. The owner of property is only liable to trespassers for malicious injury, or one resulting from gross negligence after the peril of the trespassers is known to the owner of the land.—*Driscoll v. Clark*, 172.

Injuries—Pleadings—Complaint—Liability of Owners of Property—Insufficiency.

2. (On motion for rehearing.) In an action for injuries to an infant trespassing on defendant's premises, the complaint alleged that for some time immediately preceding the injury the infant, being five years of age, and attracted thereby, had, to defendant's knowledge, been playing around defendant's machinery, and that, notwithstanding such knowledge, defendant and his agents wholly failed to warn such infant against dangers incident to his so doing, or to request him to cease playing about the machinery, and to leave the premises. *Held*, that defendant not being legally bound to keep a constant lookout to guard persons trespassing on his premises from injury, such allegation was insufficient to show a breach of any legal duty on defendant's part.—*Driscoll v. Clark*, 172.

TRIAL.

What may Constitute a "Trial."

1. The argument and submission to the district court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within Code of Civil Procedure, section 1004, subdivision 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff "at any time before trial."—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal without Prejudice—When too Late.

2. Where a motion for judgment on the pleadings has been made by defendant, under the provisions of Code of Civil Procedure, section 722, as amended by Session Laws of 1899, page 142, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within Code of Civil Procedure, section 1004, subdivision 1.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

TRUSTS.

See Resulting Trusts.

VACANCIES.

See Elections, 5.

VARIANCE.

Amendment—Surprise—Former Appeal.

1. Plaintiff cannot claim to have been surprised by the amendment of the counterclaim to conform to the proof, which defendant was permitted to make after conclusion of his direct testimony, where the same variance existed on a former trial and was called to the attention of the parties in the opinion on appeal from the decree then rendered.—*Finlen v. Heinze et al.*, 354.

VENUE.

See, also, "Fair Trial Bill."

Change of—Disqualification of Judges.

1. Under Code of Civil Procedure, section 615, subdivision 4 (before amendment by Act of 1903), authorizing change of venue "when from any cause the judge is disqualified from acting," the ground for change must be one of the causes enumerated in section 180 of the same code, as disqualifying a judge to sit in an action.—Finlen v. Heinze et al., 354.

VERDICT.

Appeal—Judgment.

1. Whether a verdict is supported by any substantial evidence, being a question of law, may be determined on appeal from the judgment.—Carman v. Mont. C. Ry. Co., 137.

Appeal—Harmless Error.

2. Where the evidence would have supported a verdict for a greater amount than that returned in favor of plaintiff, defendants were not entitled to object that the exact amount awarded was not justified by the evidence.—Brazell v. Cohn et al., 556.

Claim and Delivery—Implied Findings.

3. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action.—McGregor v. Lang, 568.

VERIFICATION.

Receivers—Complaint.

1. An *ex parte* order appointing a receiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information and belief" is insufficient.—Benepe-Owenhouse Co. v. Scheidegger, 424.

VICE-PRINCIPAL.

See Master and Servant.

WAIVER.

See Insurance, 4, 5, 8, 10, 11; Notice, 7; Pleading and Practice, 22; Privileged Communications, 1; Taxation, 2.

WARRANTY.

Sales—Evidence—Jury.

1. In an action for the price of a stove alleged by defendant to be inferior to the warranty, testimony as to experiments by witness at cooking with the stove, and that the "things I tried to cook were not fit to eat, we couldn't eat them, I could not do anything with the stove," was not an invasion of the province of the jury as drawing conclusions from the evidence.—Lander v. Sheehan, 25.

Sales—Instructions—Seller's Praise—Opinion.

2. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by

certain property in order to comply with an order of court awarding plaintiff alimony and counsel fees, and to pay certain debts. Defendant mortgaged the property, paid counsel fees and two months' alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses, failing thereafter to pay the alimony awarded. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in such an arbitrary or unlawful manner as to entitle defendant to a writ of supervisory control.—State ex rel. Dougan v. District Court et al., 34.

When Writ will Lie.

3. The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical.—State ex rel. Heinze v. District Court et al., 579.

When Issuance Premature.

4. While the lower court is proceeding within jurisdiction and before it has exceeded it, the invocation of action on the part of the supreme court by writ of supervisory control or otherwise is premature.—State ex rel. Heinze v. District Court et al., 579.

SUPPLEMENTAL TRANSCRIPTS.

See Appeal, 17.

SUPREME COURT.

Judicial Notice—Proclamation of Governor—Political History of State.

1. Under Code of Civil Procedure, section 3150, the court will take judicial notice of the contents of the proclamation of the governor calling an election, and of the political history of the state.—State ex rel. Breen v. Toole, Governor, 4.

Judicial Notice—State Officers—*Mandamus*—Terms of Office.

2. The supreme court will take judicial notice of the fact that on a certain date the persons sought to be coerced into action by *mandamus* were no longer state treasurer and attorney general, respectively, and that their successors had been elected, qualified and inducted into office.—State ex rel. Stranahan v. Board of State Canvassers et al., 13.

Administrators—Distribution of Estate—Appeal—Jurisdiction.

3. Where the distributees of a decedent's estate executed receipts for their respective shares under the decree of distribution, which was thereupon satisfied and the administrator discharged, the receipts reciting that they were not intended to cover any money or property referred to in the decree not yet discovered, thus implying that this exception was the only reservation made by the distributees as to the liability of the administrator, and thereafter appeal from such decree, the supreme court will dismiss such appeal for lack of jurisdiction.—In re Black's Estate, 51.

Receivers—Wrongful Appointment—Evidence—Supreme Court Opinion.

4. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of the supreme court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by the defendants.—Thornton-Thomas Merc. Co. v. Bretherton et al., 80.

Will Make Its Own Conclusions—When.

5. Under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), making it the duty of the supreme court to determine questions of fact, unless for a good reason a new trial or the taking of other evidence in the district court be ordered, the supreme court will hesitate to overturn findings based on substantially conflicting evidence which would justify an inference in favor of either party; but where the conflict is trifling or unsubstantial, or where the evidence preponderates decidedly against the findings, the supreme court may examine the facts, make up its own conclusion, and declare upon the rights involved accordingly.—*Bordeaux v. Bordeaux*, 159.

Equity Cases—Review—Questions of Fact—Evidence.

6. Under Code of Civil Procedure, section 21, as amended by Act of 1903 (2d Extra. Session of 1903, page 7), authorizing the supreme court to review all questions of fact, in an equity case, arising on the evidence presented in the record, and determine the same, the appellant must show that the preponderance of the evidence is against the findings of the trial court before the supreme court will disturb such findings on the ground of insufficiency of the evidence.—*Finlen v. Heinze et al.*, 354.

Statutes—Constitutionality—Equity Cases—Jurisdiction—Review.

7. Section 21, Code of Civil Procedure, as amended by Act of 1903 (2d Extra. Session, page 7), requiring the supreme court to review in equity cases all questions of fact arising upon the record and determine the same, does not purport to impose on that court any additional original jurisdiction, and hence is not unconstitutional.—*Finlen v. Heinze et al.*, 354.

Will not Grant Prohibition—When.

8. The supreme court will not grant the writ of prohibition or any writ, if not properly invocable, even though no objection be made by counsel to the exercise of its extraordinary power in the premises.—*State ex rel. Heinze v. District Court et al.*, 394.

SURGEONS.

See Physicians.

SURPRISE.

See Variance, 1.

SURVIVAL OF ACTIONS.

See Actions, 5.

TAXATION.

See, also, Notice, 6.

County Board of Equalization—Assessment—Increase—Notice.

1. The giving of ten days' notice to the taxpayer is essential to confer upon a county board of equalization power to increase the assessed valuation of his property under section 3781 of the Political Code, or to correct such assessment under the provisions of section 3789 of the same code. In either case the ten days' notice is jurisdictional.—*Montana Ore Pur. Co. v. Maher*, 480.

'Assessment—Increase—Notice—Waiver.

2. Failure by the county board of equalization to give a taxpayer the ten days' notice of an increase in his assessment required by statute, is not waived by his voluntary appearance before the board,

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after the raise had been made, for the purpose of seeking a reduction of the assessment.—*Montana Ore Pur. Co. v. Maher*, 480.

County Board of Equalization—Final Action of Board—Record.

3. An entry on the minutes of the county board of equalization, after reciting errors in the returns made to the assessor by a taxpayer, directed that officer to make the proper correction in the assessment. The pleadings admitted that the board made the entry with respect to the assessment in the amount stated in the entry. *Held*, that no other changes or records being shown, a contention that final action was not taken in the matter until after the taxpayer's voluntary appearance before the board was without merit.—*Montana Ore Pur. Co. v. Maher*, 480.

County Board of Equalization—Minute Entries—Parol Evidence.

4. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the proceedings had before the county board of equalization, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.—*Montana Ore Pur. Co. v. Maher*, 480.

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6. *Held*, that where the county board of equalization made an increase in an assessment without giving the statutory notice of ten days to the person affected thereby, such notice being jurisdictional, and omission to give it not being a mere irregularity subject to explanation, injunction will lie to restrain the collection of taxes computed on the raised valuation.—*Montana Ore Pur. Co. v. Maher*, 480.

Decree—Payment of Taxes Admittedly Due—Condition Precedent.

7. Where the county board of equalization raised an assessment without giving the ten days' notice required by statute, a decree enjoining the county treasurer from selling the property to pay the taxes computed on the raised valuation, without requiring, as a condition precedent, the payment of the tax admitted by the taxpayer to be due, was erroneous.—*Montana Ore Pur. Co. v. Maher*, 480.

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Injunctions—Pleadings—Waste.

1. (On motion for rehearing.) Where, in a suit to restrain interference with certain ditches, the complaint does not allege that defendants are tenants in common with plaintiff, but its theory is that defendants neither have nor claim any interest in the premises, defendants cannot be enjoined from cutting or damming the ditches on the theory that they are tenants in common, and, as such, cannot lawfully commit waste.—*Campbell v. Flannery et al.*, 119.

Water Rights—Unity of User.

2. To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and if such right is destroyed, the common tenancy ceases to exist.—*Norman v. Corbley*, 195.

Water Rights—Joint Notice of Appropriation.

3. Plaintiff's predecessors in interest appropriated waters for irrigation in 1868. Defendant made a subsequent appropriation in 1871

or 1874. In 1874 the parties, by oral agreement, and during that season only, used the water alternately. During one season in the early '80's there was a scarcity of water and they used the same half and half. In 1885 plaintiff and defendant filed a joint notice of their appropriation, which stated that the appropriation of each amounted to two hundred inches. Plaintiff in no manner waived or abandoned at any time his prior appropriation. *Held*, that none of the things specified constituted a conveyance by plaintiff to defendant of any interest in the former's prior appropriation, that they were not evidence that one-half the water was not sufficient for plaintiff's use, that there was not any unity of possession in the ditches, land, date of appropriation, use of the water, or the right of its use, and hence there was no tenancy in common.—*Norman v. Corbley*, 195.

Rights *Inter Se*—Common-law Rule.

4. Neither the common-law rule, that, where one cotenant occupies the common property and takes the whole profit, the other has no cause of action against him unless the acts of the occupant amount to an ouster, or unless the occupancy was under an agreement by which the occupant became bailiff for the other as to his share, nor the rule laid down by the statute of Anne (4 & 5 Anne, chapter 16), that where one cotenant receives more than his share of the rents and profits of the common property, he is liable to account to the other therefor, is in force in Montana.—*Ayotte v. Nadeau*, 498.

Statutes—Construction.

5. The Act of 1899 (Session Laws 1899, p. 134), amending Code of Civil Procedure, 1895, section 592, in the form of limitations and provisos affecting the substantial rights of tenants in common in the common property, is inapplicable to a cotenancy created prior to its passage.—*Ayotte v. Nadeau*, 498.

Action by One Against the Other—When Maintainable.

6. Under Code of Civil Procedure, section 592, an action for the reasonable value of the use and occupation of a city lot is maintainable by one cotenant against another as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one cotenant, or from a profitable use of the common property by the cotenant himself.—*Ayotte v. Nadeau*, 498.

Use of Property—Contract.

7. Tenants in common may contract with reference to the use of the common property, since their respective interests in it partake in great measure of estates in severalty.—*Ayotte v. Nadeau*, 498.

Contracts—Consideration.

8. The exclusive use of a building on the common property by one cotenant is a sufficient consideration to support his promise to the other to pay rent therefor at a stipulated rate.—*Ayotte v. Nadeau*, 498.

Action for Rents—Complaint—Sufficiency.

9. A complaint by a tenant in common against his cotenant alleged the making of a contract between the plaintiff and defendant whereby the latter was to erect a building on the common property at his own expense, and that, when the rents received by defendant were equal to one-half the cost of the building, the rents were to be equally divided between them, and that the rents received by the defendant therefrom were in excess of one-half the cost of the building, but that the defendant refused to account to plaintiff for his share. *Held*, that the complaint stated a cause of action for rents due under the contract, in view of Code of Civil Procedure, section 592, pro-

viding that, if any person shall assume and exercise exclusive ownership over any property held in common, the party aggrieved shall have his action for the injury.—*Ayotte v. Nadeau*, 498.

Action by One Tenant in Common Against the Other—Rent—Scope of Action.

10. In an action at law by one cotenant against another for rents collected and retained by the defendant for the use of a building on the common property, the interests of the parties in the building itself cannot be adjudicated, an action in ejectment being required for that purpose.—*Ayotte v. Nadeau*, 498.

Action for Rents—Burden of Proof—Instructions.

11. In an action by a tenant in common against his cotenant for rents alleged to be due to the plaintiff under a contract for the erection of a building at defendant's expense, and an equal division of rents after defendant was reimbursed by receipts of rent therefrom to the extent of one-half the cost, the burden was on plaintiff to show that defendant had been so reimbursed, and an instruction casting the burden upon defendant to show by a clear preponderance of the evidence that the building cost more than the amount alleged by plaintiff was prejudicial error.—*Ayotte v. Nadeau*, 498.

Action for Rents—Contract—Statute of Frauds.

12. A contract between tenants in common for the erection of a house on the common property by one at his own expense, and requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, is not within Civil Code, section 2340, providing that certain contracts for the sale of personal property shall not be enforceable unless in writing, nor within section 2342 of the same code, making the same provision in relation to contracts for the sale of land or any interest therein.—*Ayotte v. Nadeau*, 498.

Action for Rents—Statute of Frauds.

13. Where a contract between plaintiff and defendant as tenants in common provided for the erection of a house on the common property by defendant at his own expense, requiring him to make an equal division of the rents between them when the rents received equaled one-half the cost, and there was an immediate performance by plaintiff by his surrender to defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent should pay for the erection of the building, the contract was enforceable irrespective of the Civil Code, section 2185, subdivision 1, which provides that an agreement not to be performed within a year is invalid unless in writing, such subdivision 1 being applicable to those contracts only which *by their terms* are not to be performed within one year by *either* party.—*Ayotte v. Nadeau*, 498.

Action for Rents—Contracts—Statute of Frauds.

14. A contract between tenants in common for the erection of a house on the common property by one of them at his own expense, and requiring him to make an equal division of the rents when the rents received equaled one-half the cost, is not a contract of leasing within Civil Code, section 2185, subdivision 5, providing that an agreement for the leasing of real property for a longer period than one year is invalid unless in writing.—*Ayotte v. Nadeau*, 498.

Interest of Each—Water Rights—How Measured.

15. Where parties acquired certain land in separate parcels from the owners of a water right appurtenant to the land, they each became vested with an interest in the water measured in amount by the requirements of each, whether they were tenants in common or not.—*Bullerdick v. Hermesmeier et al.*, 541.

TENDER.

See Specific Performance, 9.

THEORY OF CASE.

Appeal—Instructions.

1. Where a cause was tried in the district court as one at law, a general verdict had and a judgment entered for plaintiff, he, on defendant's appeal, cannot change his ground in the supreme court and insist that the cause was one in equity, and that therefore error in giving or refusing instructions is not ground for reversal.—*Ayotte v. Nadeau*, 498.

TORTS.

Personal Injuries—Pleadings—Machinery Attractive to Children.

1. In an action for injuries to a child, received while playing around machinery operated by defendant, the complaint must allege either that there was an actual invitation to children to play about the machinery, or that it was so especially and unusually attractive to children that it constituted an implied invitation; and an allegation that defendant knew that the machinery did attract children is insufficient.—*Driscoll v. Clark*, 172.

Liability of Owner of Property to Trespassers—Negligence.

2. The owner of property is only liable to trespassers for a malicious injury, or one resulting from gross negligence after the peril of the trespassers is known to the owner of the land.—*Driscoll v. Clark*, 172.

Injuries—Property Owner—Liability.

3. The maxim, "*Sic utere tuo ut alienum non laedas*," has no application to injuries occurring on one's own premises, but simply to injuries occurring on other lands by the wrongful use of one's own premises.—*Driscoll v. Clark*, 172.

Legal Duties.

4. The law takes cognizance of legal duties only.—*Driscoll v. Clark*, 172.

Liability of Owners of Property to Trespassers—Pleadings—Complaint—Insufficiency.

5. (On motion for rehearing.) In an action for injuries to an infant trespassing on defendant's premises, the complaint alleged that for some time immediately preceding the injury the infant, being five years of age, and attracted thereby, had, to defendant's knowledge, been playing around defendant's machinery, and that, notwithstanding such knowledge, defendant and his agents wholly failed to warn such infant against dangers incident to his so doing, or to request him to cease playing about the machinery, and to leave the premises. *Held*, that defendant not being legally bound to keep a constant lookout to guard persons trespassing on his premises from injury, such allegation was insufficient to show a breach of any legal duty on defendant's part.—*Driscoll v. Clark*, 172.

TRADEMARKS.

Sales—Evidence.

1. In an action for the price of a stove alleged by defendant to have been worthless, the admission of testimony of a third person that he had purchased a stove of plaintiff bearing the same trademark, which proved to be worthless, was error.—*Lander v. Sheehan*, 25.

TRESPASSERS.

Liability of Owner of Property—Negligence.

1. The owner of property is only liable to trespassers for malicious injury, or one resulting from gross negligence after the peril of the trespassers is known to the owner of the land.—*Driscoll v. Clark*, 172.

Injuries—Pleadings—Complaint—Liability of Owners of Property—Insufficiency.

2. (On motion for rehearing.) In an action for injuries to an infant trespassing on defendant's premises, the complaint alleged that for some time immediately preceding the injury the infant, being five years of age, and attracted thereby, had, to defendant's knowledge, been playing around defendant's machinery, and that, notwithstanding such knowledge, defendant and his agents wholly failed to warn such infant against dangers incident to his so doing, or to request him to cease playing about the machinery, and to leave the premises. *Held*, that defendant not being legally bound to keep a constant lookout to guard persons trespassing on his premises from injury, such allegation was insufficient to show a breach of any legal duty on defendant's part.—*Driscoll v. Clark*, 172.

TRIAL.

What may Constitute a "Trial."

1. The argument and submission to the district court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within Code of Civil Procedure, section 1004, subdivision 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff "at any time before trial."—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

Dismissal without Prejudice—When too Late.

2. Where a motion for judgment on the pleadings has been made by defendant, under the provisions of Code of Civil Procedure, section 722, as amended by Session Laws of 1899, page 142, on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late, such argument and submission constituting a "trial" within Code of Civil Procedure, section 1004, subdivision 1.—*State ex rel. Mont. C. Ry. Co. v. District Court et al.*, 37.

TRUSTS.

See Resulting Trusts.

VACANCIES.

See Elections, 5.

VARIANCE.

Amendment—Surprise—Former Appeal.

1. Plaintiff cannot claim to have been surprised by the amendment of the counterclaim to conform to the proof, which defendant was permitted to make after conclusion of his direct testimony, where the same variance existed on a former trial and was called to the attention of the parties in the opinion on appeal from the decree then rendered.—*Finlen v. Heinze et al.*, 354.

VENUE.

See, also, "Fair Trial Bill."

Change of—Disqualification of Judges.

1. Under Code of Civil Procedure, section 615, subdivision 4 (before amendment by Act of 1903), authorizing change of venue "when from any cause the judge is disqualified from acting," the ground for change must be one of the causes enumerated in section 180 of the same code, as disqualifying a judge to sit in an action.—*Finlen v. Heinze et al.*, 354.

VERDICT.

Appeal—Judgment.

1. Whether a verdict is supported by any substantial evidence, being a question of law, may be determined on appeal from the judgment.—*Carman v. Mont. C. Ry. Co.*, 137.

Appeal—Harmless Error.

2. Where the evidence would have supported a verdict for a greater amount than that returned in favor of plaintiff, defendants were not entitled to object that the exact amount awarded was not justified by the evidence.—*Brazell v. Cohn et al.*, 556.

Claim and Delivery—Implied Findings.

3. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action.—*McGregor v. Lang*, 568.

VERIFICATION.

Receivers—Complaint.

1. An *ex parte* order appointing a receiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information and belief" is insufficient.—*Benepe-Owenhouse Co. v. Scheidegger*, 424.

VICE-PRINCIPAL.

See Master and Servant.

WAIVER.

See Insurance, 4, 5, 8, 10, 11; Notice, 7; Pleading and Practice, 22; Privileged Communications, 1; Taxation, 2.

WARRANTY.

Sales—Evidence—Jury.

1. In an action for the price of a stove alleged by defendant to be inferior to the warranty, testimony as to experiments by witness at cooking with the stove, and that the "things I tried to cook were not fit to eat, we couldn't eat them, I could not do anything with the stove," was not an invasion of the province of the jury as drawing conclusions from the evidence.—*Lander v. Sheehan*, 25.

Sales—Instructions—Seller's Praise—Opinion.

2. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by

which the salesman indulged in an expression of opinion concerning the merits of the stove, does not constitute a warranty, and it is for the jury to determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the stove was made as one of fact or of mere opinion.—*Lander v. Sheehan*, 25.

Breach—Measure of Damages—Instructions.

3. Where the defense in an action for the price of a stove is framed so as to give defendant the benefit of section 4314 of the Code of Civil Procedure, in relation to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages, under section 4313, for the breach of warranty of the quality of the articles sold.—*Lander v. Sheehan*, 25.

WASTE.

See Injunctions, 1.

WATERS AND WATER RIGHTS.

Appropriation—Statutory Requirements—Evidence.

1. In an action for damages for using the water of a certain river, and for an injunction to prevent interference with the alleged rights of plaintiff therein, evidence examined, and held to warrant a nonsuit for failure of the plaintiff to comply with the requirements of Compiled Statutes, fifth division, sections 1250, 1251, 1256 and 1257, in making his alleged appropriation, in that he never diverted the water claimed to have been appropriated, or constructed any dam, ditch, flume, or work of any kind to convey water to any place for a beneficial purpose, or owned the land described in his notice, or any mine, mill, smelter, ranch or property to which the water right was appurtenant, and on which the water could be utilized.—*Miles v. Butte Electric & Power Co.*, 56.

Appropriation—User.

2. Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water, or water right, does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water, or for damages for its diversion.—*Miles v. Butte Electric & Power Co.*, 56.

Title to *Corpus* of Water—Prescription.

3. Under Civil Code, section 1880, giving the right to appropriate the waters flowing in a stream, the title to the *corpus* of such waters cannot be acquired so that a prior appropriator, who has all the water that his necessities require, cannot question the right of another to use the remainder of the water, nor maintain an action against him on account of such use, and the latter cannot, so long as the former's enjoyment of all the water that he needs remains unimpaired, acquire a prescriptive right to use any given quantity of the water to the detriment of the former's appropriation.—*Norman v. Corbley*, 195.

Abandonment—Intent.

4. Abandonment is a matter of intention, and consists in the giving up of a thing absolutely without reference to any particular person or purpose.—*Norman v. Corbley*, 195.

Joint Notice of Appropriation—Abandonment.

5. A joint notice, filed by successive appropriators of water, stating that they have a claim and right to use a given quantity of water on

certain described lands, and that they appropriated the water as to one ditch in one year and as to another ditch in another year, does not of itself constitute or show an abandonment of prior appropriations, and the initiation of a new right and appropriation.—*Norman v. Corbley*, 195.

Tenancy in Common—Unity of User.

6. To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and if such right is destroyed, the common tenancy ceases to exist.—*Norman v. Corbley*, 195.

Notice of Appropriation—Effect.

7. Prior to March 12, 1885, no notice of the location or record of the appropriation of a water right was required. The Act of that date (Compiled Statutes of 1887, fifth division, section 1258), requiring persons who had theretofore acquired water rights to file a written declaration with the recorder, by its terms protected prior appropriations. *Held*, that the recording by previous appropriators of a notice in accordance with the Act did not of itself constitute an appropriation, nor affect, as between the appropriators, their respective rights to the water, but merely constituted notice to the world of their claims under their appropriations.—*Norman v. Corbley*, 195.

Joint Notice of Appropriation—Tenancy in Common.

8. Plaintiff's predecessors in interest appropriated waters for irrigation in 1866. Defendant made a subsequent appropriation in 1871 or 1874. In 1874 the parties, by oral agreement, and during that season only, used the water alternately. During one season in the early '80's there was a scarcity of water, and they used the same half and half. In 1885 plaintiff and defendant filed a joint notice of their appropriation, which stated that the appropriation of each amounted to two hundred inches. Plaintiff in no manner waived or abandoned at any time his prior appropriation. *Held*, that none of the things specified constituted a conveyance by plaintiff to defendant of any interest in the former's prior appropriation, that they were not evidence that one-half the water was not sufficient for plaintiff's use, that there was not any unity of possession in the ditches, land, date of appropriation, use of the water, or the right of its use, and hence there was no tenancy in common.—*Norman v. Corbley*, 195.

Rights of Prior and Junior Appropriators.

9. Under Civil Code, section 4605, requiring one to so use his own rights as not to infringe the rights of another, one who has a prior right to the use of the waters of one creek cannot let those waters run to waste, and use the full amount of his appropriation of the waters of another creek to the detriment of a junior appropriator on the latter creek; but such junior appropriator cannot, as of right, compel the prior appropriator to exhaust his rights in the former creek before resorting to the use of the latter creek.—*Norman v. Corbley*, 195.

Evidence—Cross-examination.

10. Where a notice of appropriation of water filed by a party and testimony given by him are both before the court, it is not permissible to bring out, by a cross-examination of the party, discrepancies between his testimony and the contents of the notice.—*Norman v. Corbley*, 195.

Homestead—Apportionment—Conveyance—Appurtenances

11. Where a homestead was set apart to a widow by the probate court, under Compiled Statutes 1887, Second Division, sections 134, 137, she had a right to convey the same, and her grantee became

vested with the fee and such conveyance vested him with whatever right she had to the use of water appurtenant thereto, together with the means of using the same.—*Bullerdick v. Hermesmeyer et al.*, 541.

Deeds—Appurtenances—Extrinsic Evidence.

12. Where a deed to certain land does not specify the particular appurtenant water right alleged to have been conveyed by it, extrinsic evidence may be resorted to to establish such right.—*Bullerdick v. Hermesmeyer et al.*, 541.

Tenants in Common—Interest of Each—How Measured.

13. Where parties acquired certain land in separate parcels from the owners of a water right appurtenant to the land, they each became vested with an interest in the water measured in amount by the requirements of each, whether they were tenants in common or not.—*Bullerdick v. Hermesmeyer et al.*, 541.

What may Constitute an Original Appropriation.

14. Where the owner of certain land had used water from a main irrigation ditch through a lateral from the date it was decreed to her by the probate court such use constituted an original appropriation, though such decree was void for want of jurisdiction.—*Bullerdick v. Hermesmeyer et al.*, 541.

Evidence—Adverse Use.

15. In a suit to determine water rights of the owners of certain land, evidence *held* insufficient to support a finding that plaintiff had acquired a right to the use of all of the waters of the stream by adverse use since 1888.—*Bullerdick v. Hermesmeyer et al.*, 541.

Public Use—Manner of Use.

16. The use of the waters in streams being declared by the Constitution, Article III, section 15, to be a public use, every citizen is entitled to divert and use them so long as he does not infringe the rights of some other citizen who has acquired a prior right by appropriation, on condition that he restore the waters to the channel of the stream on the cessation of his necessity.—*Bullerdick v. Hermesmeyer et al.*, 541.

Adverse Use—Prescription.

17. If a use of water becomes and continues adverse and exclusive for the full period described by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.—*Bullerdick v. Hermesmeyer et al.*, 541.

WITNESSES.

Exclusion from Courtroom—District Courts—Discretion.

1. Under Code of Civil Procedure, section 3371, providing that if either party requires it, the judge may exclude from the courtroom any witness of the adverse party not under examination, the application to exclude is addressed to the sound legal discretion of the trial court, subject to review only for a manifest abuse of such discretion.—*Finlen v. Heinze et al.*, 354.

Impeaching Witness—District Judges—Corrupt Decision.

2. Plaintiff, for the purpose of affecting the credibility of defendant's witness, may show that he was the active agent in procuring a person to negotiate with the judge on a former trial of the cause for a corrupt decision in favor of defendant.—*Finlen v. Heinze et al.*, 354.

Impeaching Witness—Evidence—Exclusion—Harmless Error.

3. Error in excluding evidence tending to impeach a witness for the defendant, seeking to enforce specific performance of an oral agreement for the sale of mining property, is harmless where, excluding this testimony, there is a clear preponderance of the evidence in favor of the findings for defendant.—Finlen v. Heinze et al., 354.

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"Abandonment"—

Norman v. Corbley, 203.

"Action"—

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"Connected"—

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"Contract"—

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"Dealer's Talk"—

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"*Expressio unius est exclusio alterius*"

City of Helena v. Kent, 291.

"Hearing"—

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"Railway"—

Daly Bank & Trust Co. v. Great Falls etc. Co., 306-308.

"Seller's Praise"—

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"*Sic utere tuo ut alienum non laedas*"—

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"*Simplex commendatio non obligat*"—

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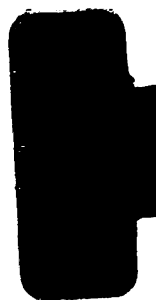
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